Petition

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ALEXANDER L. STEVAS
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No. 81-535

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES DEPARTMENT OF STATE, ET AL.,
PETITIONERS

v.

THE WASHINGTON POST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether State Department records that would reveal whether two Iranian nationals are naturalized American citizens holding valid United States passports are "similar files" within the meaning of Exemption 6 of the Freedom of Information Act and are thus eligible for withholding on the ground that public disclosure would constitute a clearly unwarranted invasion of personal privacy.

PARTIES TO THE PROCEEDING

Other parties, in addition to those named in the caption, are Alexander M. Haig, Jr., Secretary of State, and Frank M. Machak, Information and Privacy Coordinator for the Department of State.

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The Solicitor General, on behalf of the United States Department of State, the Secretary of State, and the Department's Information and Privacy Coordinator, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-5a) is reported at 647 F.2d 197. The order of the district court (App. E, *infra*, 12a-14a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1981 (App. B, *infra*, 6a-7a), and a petition for rehearing was denied on May 19, 1981 (Apps. C & D, *infra*, 8a-11a). On August 10, 1981, Justice Brennan extended the time in which to file a petition for a writ of certiorari until September 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Subsection (a)(4)(B) of the Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

2. Subsection (b)(6) of the Freedom of Information Act, 5 U.S.C. 552(b)(6), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; * * *

STATEMENT

This Freedom of Information Act ("FOIA") suit arose out of a request by respondent Washington Post for any documents of the Department of State indicating whether two named persons hold valid United States passports or are American citizens (App. A, *infra*, 2a). The State Department denied the FOIA request on the basis of Exemption 6 of the Act, which protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

The basis for the State Department's ruling was explained in an affidavit given by Assistant Secretary of State Harold R. Saunders, the Director of the Iran Working Group, dated January 14, 1980 (C.A. App. 18-20).[1] Assistant Secretary Saunders stated (C.A. App. 19) that one of the individuals named by respondent, Dr. Ibrahim Yazdi, left his position as Iranian Foreign Minister shortly after the takeover of the American Embassy in Tehran, but remained in Iran as a member of the Iranian Revolutionary Council. The other named individual, Dr. Ali Behzadnia, had been a senior officer in the Iranian Ministry of National Guidance, and while his current official position was unknown, he also was believed still to be residing in Iran. Saunders further stated (*ibid.*) that, given the current social and political conditions in Iran (which he briefly described), any confirmation or denial by the State Department that either individual possesses a United States passport or is a United States citizen "is likely to cause a real threat of physical harm to that per-

[1] "C.A. App." refers to the joint appendix filed in the court of appeals.

son." Saunders explained that even assuming there were no passport file on either of these individuals, the Department could not announce that fact without endangering the subjects of future requests for such information. As he noted (C.A. App. 20):

> If there were no passport files relating to these individuals and if the Department of State were to indicate this, our refusal in the future to disclose whether or not a passport file exists on the basis of the (b)(6) exemption in a similar Freedom of Information Act case would be tantamount to an admission that such a file existed.

Respondent filed a cross-motion for summary judgment in which it argued that naturalization and denaturalization actions are matters of public record, filed with the appropriate federal courts. Respondent also cited a pre-litigation article it had published, which claimed that one of the individuals (Yazdi) became a naturalized American citizen in 1971 and that he had not yet renounced his United States citizenship. The article asserted that the source of this information was the United States Immigration and Naturalization Service. The article also stated that Yazdi was "apparently sensitive" about his previous American residency and "flatly denied reports that he is an American citizen" (C.A. App. 56-57).

In a brief order, the district court held that the government had not met its burden under Exemption 6 because "the information sought is a matter of public record [and] the public would be best served by disclosure of the information" (App. E, *infra*, 12a-13a). The State Department then moved for reconsideration and submitted a supplemental affidavit by Assistant Secretary Saunders. This affidavit, dated April 22, 1980, explained (C.A. App. 80-81):

> 2. Since my affidavit of January 14, Dr. Yazdi has been elected to the National Assembly which is the Iranian parliament. We have had no information about Dr. Behzadnia's activities in months.
>
> 3. There continues to be intense anti-American sentiment in Iran and several revolutionary leaders have been strongly criticized in the press for their alleged ties to the United States. Any person suspected of having such a connection would likely be subject to severe scrutiny, suspicion and possible harm.

Saunders also noted that recent experience had provided several examples of the risk to Iranians whose names are linked to the United States in official documents and, in an in camera submission to the court, he mentioned four such examples (C.A. App. 80). On May 16, 1980, the district court denied the motion for reconsideration without opinion (App. F, *infra*, 14a).

The court of appeals affirmed, holding that the government failed to make the threshold showing under Exemption 6 that "the information is contained in 'personnel and medical files' or 'similar files'" (App. A, *infra*, 2a). Citing two previous D.C. Circuit decisions, *Board of Trade* v. *CFTC*, 627 F.2d 392 (1980), and *Simpson* v. *Vance*, 648 F.2d 10 (1980),[2]

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[2] *Board of Trade* involved an FOIA request for the identities of "trade sources" who had supplied information to the Commodity Futures Trading Commission concerning plaintiff's plywood futures contract. The court of appeals held that Exemption 6 was inapplicable on alternative grounds: first, that the data sought did not qualify as "similar files" because it dealt with the Board's business, not with any aspect of the informants' personal lives (*i.e.*, "no fact of an intimate nature is likely to be revealed"), and second, because the court was not persuaded that disclosure would constitute a "clearly unwarranted invasion of personal privacy." 627 F.2d

the court stated that "to qualify as 'similar' files, the recorded data must incorporate "intimate details" about an individual, information of the same mag-

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at 399-400. The court of appeals followed *Board of Trade* in *Sims* v. *CIA*, 642 F.2d 562 (1980), which held that a list of the names of persons and institutions who conducted scientific and behavorial research under contracts with or funded by the Central Intelligence Agency did not constitute "similar files" within the meaning of Exemption 6. The court stated (*id.* at 575) that "Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships[,]" and that "the possibility of embarrassment to CIA researchers" was "irrelevant" under the exemption. *Ibid.*

Thus, in *Board of Trade* and *Sims*, the District of Columbia Circuit ruled that "information connected with professional relationsh[illegible] is automatically ineligible for Exemption 6 considerati[illegible]. *Sims* v. *CIA*, *supra*, 642 F.2d at 562. The court of appeals further enlarged the class of data excluded from possible protection under Exemption 6 in *Simpson* v. *Vance*, *supra*. *Simpson* involved an FOIA request for the State Department's "Biographical Register," a compilation of personal information about government employees in the field of foreign relations, describing their educational backgrounds, employment experience, and other essential biographical facts (including data on naturalization, if applicable). The court of appeals held that, except for marital status, the information must be disclosed because, "[a]lthough there is no dispute that the information which the Department is withholding relates to the employees' private lives, and therefore some privacy interest is present, that interest is not of the 'magnitude' such as those warranting protection in personnel and medical files." 648 F.2d at 14, quoting *Board of Trade* v. *CFTC*, *supra*, 627 F.2d at 400. Applying an "intimate details" standard, the court concluded that the data was not within a "similar file" and therefore was not protectable under Exemption 6. *Ibid.* The court expressly declined to "reach the question of balancing" and therefore considered irrelevant the State Department's argument that disclosure of the data might subject diplomatic personnel overseas to physical harm inflicted by terrorists. 648 F.2d at 16-17.

nitude—as highly personal or intimate in nature—as that at stake in personnel and medical records'" (App. A, *infra*, 2a-3a). Concluding that "the facts of current citizenship or possession of a United States passport are no more personal than the dates of naturalization held nonexempt in *Simpson*," the court declared that, "[w]ithout overturning *Simpson* and our earlier expressions consistent with it, we cannot rule that the information sought here is contained in files 'similar' to 'personnel and medical files'" (*id.* at 3a-4a). Because the court held that the files in question do not qualify under "the first facet of the Exemption 6 test," it ordered disclosure without reaching "the issue of balancing interests in disclosure against privacy concerns" (*id.* at 4a).

The court of appeals professed itself "sympathetic to the Department's reluctance to release these records," particularly in light of the statement in the Saunders affidavit that "release of this information may endanger the lives of the two individuals since they have returned to Iran" (App. A, *infra*, 3a-4a). The court remarked, however, that it found "inescapable the response supplied in *Simpson*" that Exemption 6 was not designed to protect the physical security of persons stationed or residing overseas. "The Department's concern is clear," the court concluded, "but it is not within our province to recast Exemption 6 or this court's precedent to accommodate that concern" (*id.* at 4a).

Judge Lumbard, sitting by designation, concurred only because he believed that "*Simpson* states the law of this Circuit on the issue" (App. A, *infra*, 5a). He added, however (*ibid.*):

> Were the issue one of first impression in this Circuit, I would vote to hold that citizenship or

> naturalization information is protected from disclosure by Exemption 6 of the Freedom of Information Act, 5 U.S.C. § 552(b)(6). * * * I think it quite possible that the *Simpson* panel failed to envision situations such as the one before us now, in which revelation of American citizenship information relating to officials of foreign governments would be extremely embarrassing to the individuals involved. The facts of the case before us dramatically demonstrate that citizenship and naturalization information is often of a highly personal and potentially embarrassing nature. I also note that while such information is a matter of public record on file in various federal district courts across the country, the information is difficult to locate, and the same appears to be true of the marital and family information which was held excludable in *Simpson*.

The court of appeals subsequently denied the government's petition for rehearing and suggestion for rehearing en banc by a 6-4 vote (App. D, *infra*, 10a-11a).[3]

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the scope of the protection afforded by Exemption 6 of the Freedom of Information Act, 5 U.S.C. 552(b)(6), to information in government files about particular individuals. In a series of restrictive interpretations, the District of Columbia Circuit has held that, unless a file is a personnel or medical file or consists of "intimate details" about an individual, personal information in that file may not even be

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[3] Judges Tamm, MacKinnon, Robb and Wald voted to grant en banc review. Judge Wright did not participate in the consideration of the petition (App. D, *infra*, 11a).

scrutinized by a district court under Exemption 6 to determine if its disclosure would constitute a clearly unwarranted invasion of the affected individual's personal privacy. In the present case, for example, the court of appeals has held that citizenship and passport information in the State Department's records do not constitute "similar files" within the meaning of the exemption, and thus that the courts are prohibited from considering whether the public interest in knowing whether two Iranian nationals are naturalized United States citizens holding United States passports is outweighed by the likelihood, established by unrebutted affidavits, that disclosure of such information, if it exists, would result in physical harm to the two men, the most palpable example of an invasion of personal privacy.

It is inconceivable that Congress intended this startling result. The court of appeals' construction of Exemption 6 finds no support in the exemption's language or legislative history, defeats its underlying purpose, and cannot be reconciled with this Court's explanation of the exemption in *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976). The decision below is also in conflict with the construction of Exemption 6 adopted by several other courts of appeals, which have held that it is sufficient that information be "personal" in order to meet the "similar files" test and that other considerations are subsumed in the balancing test, *i.e.*, the determination whether release of the information at issue would constitute an invasion of personal privacy and whether the desirability of avoiding that result clearly outweighs the public interest in disclosure. Finally, review by this Court is essential because the decision below has potentially far-reaching consequences: under the D.C. Circuit's holding, vast amounts of personal (but not

"intimate") data contained in government files would now be subject to mandatory release under the FOIA, regardless of the minimal public interest in disclosure or the magnitude of the privacy invasion that would result.

1. Exemption 6 of the Freedom of Information Act excepts from the Act's disclosure requirements "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The court of appeals read the phrase "similar files" in this exemption as covering only files that "incorporate 'intimate details' about an individual, information 'of the same magnitude—as highly personal or intimate in nature —as that at stake in personnel or medical records' " (App. A, *infra*, 2a-3a, quoting *Board of Trade* v. *CFTC*, *supra*, 627 F.2d at 398). But the court's "intimate details" test is not supported by the language of Exemption 6, and the exemption's legislative history suggests that Congress intended this threshold requirement to encompass a far broader category of documents.[4]

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[4] We note that the opinion of the court of appeals in this case, like the opinion in *Board of Trade* v. *CFTC*, *supra*, ambiguously applies the term "files" both to the information sought by the requester and to the documents or system of documents that contain it. Thus, the court below, in applying the "intimate details" test, focused on "facts of current citizenship or possession of a United States passport" in its holding that "similar files" were not involved (App. A, *infra*, 3a). Yet it initially stated (*id.* at 2a; emphasis added) that the threshold showing to be made by an agency invoking Exemption 6 is that "the information *is contained in* 'personnel and medical files' or 'similar files' * * *." Similarly, the court in *Board of Trade* first described the test as "whether the desired information *is contained in* documents that are 'similar files' within the purview of * * * [E]xemption [6]"

When Congress originally considered the question of protecting personal privacy,[5] it recognized that per-

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(627 F.2d at 396; emphasis added) but later characterized the test as "whether information to which access is denied under the aegis of Exemption 6 is 'similar' to personnel or medical files" (*id.* at 397).

In our view, a focus on the nature of the information requested is more in keeping with the congressional intent to prevent harm to individuals from the release of information about them that is contained in government files. Even if the focus is properly on the character of the documents or record system in which the personal information is contained, however, the court of appeals still erred in finding that the threshold showing had not been made. The information sought by respondent, if it exists in the Department of State, would most likely be found in the Department's passport application files (see C.A. App. 11, ¶ 4). (Such information might, in some cases, also be found in files concerning the initiation of an expatriation proceeding. These records, most notably the passport application records, contain much sensitive, personal information in addition to citizenship and passport status. Among the matters that may appear on a passport application form are the maiden name of the applicant's mother, the applicant's marital status (including divorces), and the purpose of the trip the applicant plans to take upon receipt of the passport. Since the District of Columbia Circuit has held that martial status may be withheld under Exemption 6 if disclosure is clearly unwarranted (*Simpson* v. *Vance, supra*, 648 F.2d at 17), it would appear that passport application files should meet the threshold test as well, regardless of whether the test focuses on the records or the particular information sought.

[5] The earliest versions of Freedom of Information Act bills did not contain a separate exemption for personal privacy. This omission was pointed out at hearings before the Senate Committee on the Judiciary by Assistant Attorney General Norbert A. Schlei:

> The range and volume of personal information in agency files, the countless channels by which it comes

sonnel and medical files usually contain confidential personal data that deserve protection from mandatory public disclosure, and accordingly it specifically mentioned "personnel and medical files" in Exemption 6. As the first Senate Report stated: "In an effort to indicate the types of records which should not be generally available to the public, the bill lists personnel and medical files." S. Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964). The Senate Report further explained that "[s]ince it would be impossible to name all such files, the exception contains the wording "and similar records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Ibid.*

In their subsequent explanations of the language proposed by the first Senate Report,[6] both houses of

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into the Government's possession, the extreme variety of needs for nondisclosure, and the infinite number of possibilities of injury to innocent individuals, indeed to any one of us, by its publication are beyond conjecture and certainly defy simple solution. Only a most thoroughgoing study of the extent of such information, its nature and location, and the legitimate needs for disclosure will provide satisfactory provisions to govern records containing private personal information.

Freedom of Information: Hearings on S. 1666 and S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 199 (1963).

[6] S. 1666, 88th Cong., 1st Sess. (1963), to which the first Senate Report was addressed, exempted "personnel files, medical files, and similar *matter* the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (emphasis added). S. 1160, 89th Cong., 1st Sess. (1965), the subject of the second Senate Report, exempted "personnel and medical files, and similar *files* the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (emphasis added). We have found nothing

Congress recognized that Exemption 6 incorporates a single balancing standard applicable to all types of covered files. Thus, the second Senate Report stated (S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added)):

> Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc., have great quantities of files, the confidentiality of which has been maintained by agency rule but without statutory authority. There is a consensus that these files should not be opened to the public, and the committee decided upon a general exemption rather than a number of specific statutory authorizations for various agencies. *It is believed that the scope of the exemption is held within bounds by the use of the limitation of "a clearly unwarranted invasion of personal privacy."*
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> The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental infor-

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in the legislative history to indicate that this change in terms was intended to have any substantive effect. However, Professor Davis has suggested that the change from "similar matter" to "similar files" indicates that all three categories must be treated alike. K. Davis, *Administrative Law Treatise* ¶ 3A.22 n.94 (Supp. 1970). In Professor Davis' view, this means that none of the three categories of files is to be considered exempt in its entirety; rather, the balancing test is to be applied to each segment of information at issue, with the result that some information in a file may be exempt and other information from the same file nonexempt. This concept of a single balancing policy governing all three categories is central to this Court's holding in *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976) (discussed at pages 18-20, *infra*).

> mation. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.[7]

The House Report expressed the same view (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (emphasis added; footnote omitted)):

> Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority. A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record. *The limitation of a "clearly unwarranted invasion of personal privacy" provides a proper balance between the protection of an individual's right of privacy and the preservation of the public right to Government information by excluding those kinds of files the disclosure of which might harm the individual.* The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records.

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[7] Almost identical language also appeared in the first Senate Report, S. Rep. No. 1219, *supra*, at 7, 14.

Thus, Congress added the phrase "and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" because it recognized that it was impossible to identify all types of government information that might warrant protection on personal privacy grounds. The term "similar files" was simply an inclusive catch-all, designed to refer to the myriad sets of government records that contain personal information having the potential for embarrassment in particular cases.[8] At the same time, Congress was aware that not all information about individuals should be kept confidential, particularly when that information touches on some matter of public concern. Accordingly, Congress added the requirement, applicable to all information meeting the threshold "files" test, that the government demonstrate that disclosure would constitute "a clearly unwarranted invasion of personal privacy." The information at issue here plainly meets this test

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[8] This interpretation of the threshold "similar files" test under Exemption 6 is also contained in the *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (1967), which states (at 36; emphasis added) that "the exemption is intended to exclude from the disclosure requirements all personnel and medical files, and *all private and personal information contained in other files* which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person * * *." And in explaining the 1974 amendment to Exemption 7(C), the *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* (1975) states (at 9-10; emphasis added) that Exemption 6 protects "information about an individual which he could reasonably assert an option to withhold from the public at large because of its intimacy *or its possible adverse affects upon himself or his family.*"

since it is personal information about particular individuals in government files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy [9]—indeed, disclosure would endanger their liberty and safety.

The court of appeals' holding that information contained in government files other than "medical" or "personnel" files must meet an additional, highly stringent threshold test, *i.e.*, that it consist of "intimate details," is at odds with the approach described in the legislative reports, and it produces anomalous results that Congress could not have intended. Not

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[9] The district court granted respondent's FOIA request because it thought that the information requested was a matter of public record (App. E, *infra*, 13a). As Judge Lumbard responded, however, "the information is difficult to locate," and "the marital and family information which was held excludable in *Simpson*" was also information that could be located, with some effort, from public records (*id.* at 5a). Moreover, it is reasonable to assume that respondent has pursued this litigation because it is seeking a definitive and official answer to its inquiry from the Department of State. However, as the Saunders affidavits make clear, the very fact of an official State Department pronouncement would endanger the safety of the individuals involved. The same answer applies to respondent's contention below that the Immigration and Naturalization Service has already confirmed certain information about one of the individuals and that respondent has published that fact. Given the limitations of INS records (the INS cannot verify that a name in their files identifies the person about whom information is sought) only the Department of State can provide the definitive answer that respondent seeks. Compare *Philippi* v. *CIA*, No. 80-1940 (D.C. Cir. June 25, 1981), slip op. 10; *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975).

all information contained in personnel or medical files is of a type that would be considered highly "intimate." But intimate or not, information about an individual contained in such files may be withheld if, in the particular circumstances, its disclosure would constitute a clearly unwarranted invasion of personal privacy. The *identical* personal information about the same individual would be unprotected, however, if it is not contained in a medical or personnel file, because it would then not meet the court of appeals' stringent "similar files" test: notwithstanding the harm to the individual resulting from disclosure, it would not be *generically* intimate information.

This standard frustrates the congressional purpose in establishing "a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H.R. Rep. No. 1497, *supra*, at 11. Congress surely did not intend to allow individuals to be damaged by a clearly unwarranted invasion of their personal privacy simply because personal information about them fell into the wrong type of government file or the wrong general class of information.[10]

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[10] In *Simpson* v. *Vance*, *supra*, the court of appeals in fact reached just such a bizarre result. It held that the file in question, the State Department's "Biographical Register," was not itself a "personnel file" and therefore could only be protected under Exemption 6 as a "similar file." However, under its "intimate details" test, the court concluded that the document did not qualify as a "similar file" since most of the information in question was not sufficiently personal or confidential (648 F.2d at 14). Therefore, it ordered disclosure of the information without reaching "the question of balancing." *Id.* at 17. The court reached this result even though it acknowledged that "all of the information can be found in a

2. Our reading of Exemption 6 is also supported by this Court's decision in *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976). The government had contended in *Rose* that Exemption 6 provides a blanket protection for all material in personnel files, rather than protection only for that material the disclosure of which would "constitute a clearly unwarranted invasion of personal privacy." After a thorough canvass of the legislative history of Exemption 6, this Court rejected the government's contention, stating (425 U.S. at 372-373):

> Plainly Congress did not itself strike the balance as to "personnel files" and confine the courts to striking the balance only as to "similar files". To the contrary, Congress enunciated a single policy, to be enforced in both cases by the courts "that will involve a balancing" of the private and public interests.[10]

In footnote 10, the Court added:

> See generally H.R. 1497, p. 11: "A *general* exemption for the category of information is much more practical than separate statutes protecting each type of personal record. The limi-

---

personnel file." *Id.* at 16. Presumably, if the plaintiff had made a direct request for the same information in the personnel file itself, the court would have engaged in the balancing process that it eschewed in *Simpson* simply because the same information was in a different type of file.

An analogous exaltation of form over substance appears in *FBI* v. *Abramson*, No. 79-2500 (D.C. Cir. Oct. 24, 1980), cert. granted, No. 80-1735 (June 15, 1981), in which the same court of appeals held that information that was collected by an agency for law enforcement purposes and that met the criteria of Clause C of Exemption 7 could not be withheld under Exemption 7(C) when later reproduced in a document not compiled for law enforcement purposes.

> tation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance . . . ." (Emphasis supplied.) The Senate Report, as well, speaks of a "general exemption" which is "held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.' " S. Rep. No. 813, p. 9.

The Court also rejected the government's contention that the documents at issue in *Rose*—case summaries of honor and ethics hearings at the Air Force Academy—were "personnel files." Instead, the Court characterized the files as "similar files" because they related to the discipline of cadet personnel and "most significantly, the disclosure of these summaries implicates similar privacy values; for as said by the Court of Appeals, 495 F.2d at 267, 'identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends' " (425 U.S. at 376-377).

Contrary to the conclusion of the District of Columbia Circuit (see, *e.g.*, *Sims* v. *CIA*, 642 F.2d 562, 575 (1980)), the Court did not thereby create an "intimate details" standard for determining whether requested records are "similar files," *i.e.*, it did not hold that *only* personal information of a type that would be likely to cause such disgrace or embarrassment in almost every case could qualify as "similar files." Indeed, the Court noted its agreement with the court of appeals that "the key words, of course, are 'a clearly unwarranted invasion of personal privacy' " (425 U.S. at 371, quoting *Rose* v. *Department of the Air Force*, 495 F.2d 261, 266 (2d Cir. 1974)). (The Second Circuit, in whose views the Court there-

by concurred, had clearly seen the "investigation into the nature of the privacy interest invaded" as a part of the inquiry into whether there was "a clearly unwarranted invasion of personal privacy," not as an element of the threshold "files" test. 495 F.2d at 266.) This same approach is confirmed as well by this Court's observation in *Rose* concerning the light cast by the legislative history on the term "personnel files" (425 U.S. at 375 n.14; emphasis added):

> There is sparse legislative history as to the precise scope intended for the term "personnel files," *a detail which itself suggests that Congress intended that particular characterization not to be critical in the application of Exemption 6.* But it is quite clear from the committee reports that the *primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters* in such files as those maintained by the Department of Health, Education and Welfare, the Selective Service, and the Veterans Administration.

In sum, throughout the opinion in *Rose*, this Court indicated its understanding that Congress intended the phrase "clearly unwarranted invasion of personal privacy" to be the principal limiting criterion for Exemption 6. The Court nowhere suggested that personal information, the disclosure of which could result in the most serious of invasions of personal privacy, would have to be disclosed to the public despite Exemption 6 because it failed to meet a threshold test of the kind now imposed in the District of Columbia Circuit.

3. Review of this issue is necessary to resolve a conflict in the circuits. The court of appeals' holding has recently been cited with approval in several ap-

pellate decisions (see notes 11 & 13, *infra*), but it is inconsistent with the construction of Exemption 6 adopted by other courts of appeals.

In the leading case of *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133 (1974), the Third Circuit held that "similar files" in Exemption 6 covered a list of the names and addresses of persons who had registered with the United States Bureau of Alcohol, Tobacco and Firearms to produce wine for family use. The court stated (*id.* at 135; footnote omitted):

> We believe that the list of names and addresses is a "file" within the meaning of Exemption (6). A broad interpretation of the statutory term to include names and addresses is necessary to avoid a denial of statutory protection in a case where release of requested materials would result in a clearly unwarranted invasion of personal privacy. Since the thrust of the exemption is to avoid unwarranted invasions of privacy, the term "files" should not be given an interpretation that would often preclude inquiry into this more crucial question.
>
> Furthermore, we believe the list of names and addresses is a file "similar" to the personnel and medical files specifically referred to in the exemption. The common denominator in "personnel and medical and similar files" is the personal quality of information in the file, the disclosure of which may constitute a clearly unwarranted invasion of personal privacy. We do not believe that the use of the term "similar" was intended to narrow the exemption from disclosure and permit the release of files which would otherwise be exempt because of the resultant invasion of privacy.

The *Wine Hobby* reading of "similar files" has been followed by two other courts of appeals.[11] In *Pacific Molasses Co.* v. *NLRB*, 577 F.2d 1172 (1978), the Fifth Circuit held that individual union authorization cards held by the NLRB are "similar files" within the meaning of Exemption 6. After an extensive discussion of the legislative history and case law on the issue, the court of appeals stated (577 F.2d at 1181):

> It is rather apparent to us that the determining factor in deciding whether information contained in government files is protected from disclosure hinges on the personal nature of that information. Given this as our starting point,

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[11] The Third Circuit applied the *Wine Hobby* standard in *Committee on Masonic Homes* v. *NLRB*, 556 F.2d 214, 219-220 (1977), holding that individual union authorization cards possessed by the NLRB are "similar files." However, in *Ferri* v. *Bell*, 645 F.2d 1213 (1981), the Third Circuit ruled that "similar files" did not cover the arrest records of the FOIA requester's co-defendant in a criminal case, stating (*id.* at 1217):

> The common denominator of the files covered by Exemption 6 is their "personal quality". *Wine Hobby USA, Inc.* v. *Internal Revenue Service*, 502 F.2d 133, 135 (3d Cir. 1974). Because of the societal significance attached to the event, an arrest clearly lacks the personal quality of a medical examination. Cf. *Washington Post Co.* v. *Department of State*, No. 80-1509 (D.C. Cir. Feb. 24, 1981) (citizenship records not "similar files" because citizenship is not an "intimate" detail).

On July 6, 1981, the government filed a petition for rehearing in *Ferri*, asking the court of appeals to withdraw this portion of its opinion as unnecessary to the decision and erroneous. The court on September 8, 1981, asked the parties to brief the issues raised by the government's petition.

> we have no trouble holding that the personal preference of employees with regard to whether or not they desire union representation is sufficiently personal in nature to fall within the definition of "similar files." [12]

In choosing to follow the Third Circuit's approach in *Wine Hobby*, the Fifth Circuit specifically rejected an "intimate details" test that it found in a Fourth Circuit case, *Robles* v. *EPA*, 484 F.2d 843 (1973).[13]

---

[12] In *Church of Scientology of California* v. *Department of the Army*, 611 F.2d 738 (1979), the Ninth Circuit cited *Pacific Molasses* with approval in connection with the test for "similar files." *Id.* at 746. In holding that documents generated in security and background investigations of particular individuals conducted by the Department of Defense and the Department of the Army are "similar files," the Ninth Circuit noted simply that they contained "a sufficient amount of personal information to merit consideration for exemption (6) status." *Id.* at 747. (The documents included details of religious affiliations, employment background, and personal life; one included information relating to political affiliations and another contained "allusions to emotional make-up." *Id.* at 744-745.)

[13] In *Robles*, plaintiff sought access to a list of the names and addresses of owners of buildings, public and private, whose radiation levels exceeded the Surgeon General's safety guidelines. A majority of the Fourth Circuit panel ordered disclosure of the list in an opinion that may be read to adopt an "intimate details" approach to "similar files" (although the court went on to hold that disclosure was not "clearly unwarranted"). 484 F.2d at 845-848. Judge Widener dissented as to individuals who furnished information concerning their private homes under a good faith agreement that it would not be disclosed, stating that, for such persons, "the files of information concerning their homes" are "similar files." *Id.* at 848. While the Fifth Circuit in *Pacific Molasses*

The Fifth Circuit declared (577 F.2d at 1181 n.5):

> We realize that the *Robles* test of "intimate details of a highly personal nature" is somewhat more restrictive than the inquiries made in *Wine Hobby* or *Rose*. We feel, however, that the manner in which you classify personal information should not be the crucial factor in deciding

---

read *Robles* to adopt a restrictive approach to "similar files," a later panel of the Fifth Circuit suggested that *Robles* was in accord with the expansive *Pacific Molasses* approach. *Harbolt* v. *Department of State*, 616 F.2d 772, 774 (1980) (upholding nondisclosure of names and addresses of American citizens imprisoned in foreign countries on narcotics offenses). The Tenth Circuit also appears to view *Robles* as adopting a broad construction of "similar files." *Campbell* v. *Civil Service Commission*, 539 F.2d 58, 61 (1976).

In *Kurzon* v. *Department of Health and Human Services*, 649 F.2d 65 (1981), the First Circuit, citing *Washington Post* and the other District of Columbia Circuit decisions that it follows, seemingly approved of the D.C. Circuit's "intimate details" test for "similar files" in rejecting an Exemption 6 claim to withhold lists of names and addresses of unsuccessful applicants for research grants from the National Cancer Institute. 649 F.2d at 68-69, 70 n.5. However, the *Kurzon* court's resolution of the "similar files" issue appears to have been influenced in part by its determination that none of the grant applicants would suffer any appreciable harm as a result of the disclosure. *Id.* at 69-70.

In *Brown* v. *FBI*, No. 81-6064 (Aug. 24, 1981), the Second Circuit cited *Board of Trade* v. *CFTC*, *supra*, in applying an "intimate details" standard to *uphold* an Exemption 6 claim for FBI files on a kidnaping victim who testified against the kidnaper. (The FOIA request, made by the convicted kidnaper, sought records containing information about any compensation the victim received for her testimony, her involvement in the government's Witness Protection Program, the custody of her children, her criminal record, and any details relating to her possible involvement with illegal drugs.)

> whether Exemption 6 applies, but rather the emphasis should be placed on whether disclosure of the information would result in a clearly unwarranted invasion of personal privacy.

The Sixth Circuit likewise has followed the *Wine Hobby* approach to the proper construction of "similar files" in *Madeira Nursing Center, Inc.* v. *NLRB, Region No. 9*, 615 F.2d 728 (1980), holding (*id.* at 730):

> Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Union authorization cards cannot be characterized as "personnel or medical files;" however, we are convinced that these cards do fall within the meaning of "similar files" for purposes of Exemption 6. We decline to force on the phrase "similar files" the narrow, technical construction urged by appellant. Instead, we take the words to mean that the records in question must, like medical and personnel files, contain information of a personal or confidential nature. *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133 (3rd Cir. 1974), supports this interpretation.

These decisions conflict with the District of Columbia Circuit's analysis of Exemption 6. In each of these cases, the court held that the personal nature of the records requested was sufficient to satisfy the threshold "similar files" test of the exemption and to require that disclosure be measured by whether release of the records would constitute a "clearly unwarranted invasion of personal privacy." By contrast, because the personal records at issue in this case were not considered to involve "intimate" details, the court below held that they were not "similar

files," pretermitted a balancing approach, and ordered disclosure as a matter of law.

4. Finally, review by this Court is warranted because the decision below has potential far-reaching consequences in view of the vast store of personal data about individuals contained in government files. Federal agencies of necessity accumulate records containing personal data on virtually every American. As the Department of Justice explained at the Senate Judiciary Committee Hearings on the FOIA (*Hearings on S. 1666 and S. 1663, supra*, at 199):

> The range and volume of personal information in agency files, the countless channels by which it comes into the Government's possession, the extreme variety of needs for nondisclosure, and the infinite number of possibilities of injury to innocent individuals, indeed to any one of us, by its publication are beyond conjecture and certainly defy simple solution.

Yet, under the court of appeals' decision, as to much of the personal information in their files agencies would be precluded from asserting Exemption 6 on the basis of the impact release might have on the individuals affected.

By its adoption of Exemption 6, Congress intended that the disclosability of personal information in agency files be determined under a single, flexible, balancing approach, with disclosure to depend upon a weighing of the invasion of privacy and the benefits of public access. See *Department of the Air Force* v. *Rose, supra*, 425 U.S. at 373. The court of appeals' decision undermines this protection of individual privacy by establishing rigid, technical standards that will often mandate disclosure without resort to such balancing. In light of the congres-

sional purpose embodied in Exemption 6, however, Congress could not have desired to compel release of *any* personal record whose disclosure would constitute a clearly unwarranted invasion of privacy.[14]

The decision below is particularly damaging because it is binding on district judges in the District of Columbia Circuit, where every withholding of agency records under the FOIA may be challenged. See 5 U.S.C. 552(a)(4)(B). Indeed, current Department of Justice figures reveal that 44% of the FOIA suits brought in fiscal year 1980 were filed in this circuit. Moreover, as we stated above (see notes 11 & 13, *supra*), the decision below has recently been cited with approval in decisions of two other circuits. This Court should grant review to arrest this development and to ensure that all the lower federal courts remain faithful to Exemption 6 and the important interests it protects.

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[14] It should be emphasized that the government's reading of "similar files" would not result in the withholding of all personal information in agency records. Agencies will still have to determine, first, that the information is personal, second, that release of the information would constitute an invasion of privacy, and third, that any such invasion would be clearly unwarranted in view of the public interest in disclosure. But, in contrast to the D.C. Circuit's approach, agencies would be able to engage in this analysis, and would be able to protect the privacy of individuals from unjustified harm, no matter which type of agency file contains the personal information.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

80-1509

THE WASHINGTON POST COMPANY

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,
APPELLANTS

80-1606

THE WASHINGTON POST COMPANY

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 79-2688)

Argued October 23, 1980

Decided February 24, 1981

Before: LUMBARD,* *Senior Circuit Judge* for the United States Court of Appeals for the Second Circuit, ROBB and GINSBURG, *Circuit Judges.*

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion PER CURIAM.

Concurring opinion filed by *Senior Circuit Judge* LUMBARD.

Per Curiam: In this Freedom of Information Act proceeding the Washington Post seeks Department of State records that would indicate whether two individuals now residing in Iran are U.S. citizens or hold U.S. passports. The Department withheld the records, claiming that they were exempt from disclosure under 5 U.S.C. § 552(b)(6) (1976). That provision protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." On cross-motions for summary judgment, the district court ordered disclosure of the records. The Department of State appeals from that judgment.

This court's precedent establishes that an agency may not withhold information on the basis of Exemption 6 unless the agency makes two showings: (1) the information is contained in "personnel and medical files" or "similar files" and (2) disclosure would constitute a "clearly unwarranted invasion of personal privacy." *Simpson* v. *Vance*, No. 79-1889, slip op. at 5 (D.C. Cir. Sept. 25, 1980) (quoting the statutory language). We hold that in the circumstances presented, the Department of State is unable to meet the first facet of the statutory test as delineated in *Simpson*. Therefore we do not engage in the further inquiry the Department invites.

The Department argues initially that the records at issue are similar to personnel files because citizenship is an intimate personal detail. We rejected that argument in *Simpson*, *supra*. There we reiterated that to qualify as "similar" files, the recorded data must incorporate "intimate details" about an individual, information " 'of the same magnitude—as

highly personal or as intimate in nature—as that at stake in personnel and medical records.'" Slip op. at 7-8 (quoting *Board of Trade* v. *Commodity Futures Trading Commission*, 627 F.2d 392, 398 (D.C. Cir. 1980)). We held, specifically, that a Department of State publication, the *Biographic Register*, was not similar to personnel files and, therefore, was not protected from disclosure under Exemption 6. The *Register* contained information such as place of birth, date of naturalization, educational background, and work experience of senior-level and mid-level federal employees involved in this country's foreign policy.[1] We conclude that the facts of current citizenship or possession of a United States passport are no more personal than the dates of naturalization held nonexempt in *Simpson*.[2] Without overturning *Simpson* and our earlier expressions consistent with it, we cannot rule that the information sought here is contained in files "similar" to "personnel and medical files."

The Department urges that release of this information may endanger the lives of the two individuals since they have returned to Iran and "[a]ny in-

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[1] In *Simpson* we did allow the Department to delete information about the employees' marital status. Records revealing marital status had been found to be "similar files" in Rural Housing Alliance v. United States Department of Agriculture, 498 F.2d 73 (D.C. Cir. 1974).

[2] The Department attempts to distinguish *Simpson* on the ground that the directory involved there contained information on thousands of employees while the records sought in this case concern only two individuals. But our task is to determine whether the files from which information is sought are "similar" to "personnel and medical files." That determination remains constant; it does not vary with the amount of information the requester seeks.

dividual in Iran who is suspected of being an American citizen or of having American connections is looked upon with mistrust." Affidavit of Harold H. Saunders, at 2; Joint Appendix at 19. The Department pressed a similar point in *Simpson*, arguing that release of the biographical directory might endanger United States diplomatic personnel abroad. As in *Simpson*, since we conclude that the files in question do not qualify under the first facet of the Exemption 6 test, we do not reach the issue of balancing interests in disclosure against privacy concerns.

While we are sympathetic to the Department's reluctance to release these records, we find inescapable the response supplied in *Simpson*: "[T]he Department is attempting to fit a square peg in a round hole"; "Congress did not design Exemption 6 to encompass the withholding of information on the basis of the physical security [of persons stationed or residing overseas]." Slip op. at 15. The Department's concern is clear, but it is not within our province to recast Exemption 6 or this court's precedent to accommodate that concern.

Affirmed.

LUMBARD, *Circuit Judge* (concurring):

Were the issue one of first impression in this Circuit, I would vote to hold that citizenship or naturalization information is protected from disclosure by Exemption 6 of the Freedom of Information Act. 5 U.S.C. § 552(b)(6). Although this Circuit held to the contrary in *Simpson* v. *Vance*, No. 79-1889 (D.C. Cir. Sept. 25, 1980), the panel there was concerned with naturalization information relating to State Department employees, one item of information (and an item listed only for those employees who in fact had been naturalized) out of twelve sought by the plaintiffs in that case. The opinion does not include any specific discussion of the personal privacy interests at stake in disclosure of citizenship and naturalization information. I think it quite possible that the *Simpson* panel failed to envision situations such as the one before us now, in which revelation of American citizenship information relating to officials of foreign governments would be extremely embarrassing to the individuals involved. The facts of the case before us dramatically demonstrate that citizenship and naturalization information is often of a highly personal and potentially embarrassing nature. I also note that while such information is a matter of public record on file in various federal district courts across the country, the information is difficult to locate, and the same appears to be true of the marital and family information which was held excludable in *Simpson*.

I recognize, however, that *Simpson* states the law of this Circuit on the issue. Because of this, and only because of this, I now concur. *Cf. United States* v. *Lucchese*, 247 F.2d 123, 129 (2d Cir. 1957) (Potter Stewart, J., concurring), *rev'd sub nom. Matles* v. *United States*, 356 U.S. 256 (1958).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 79-2688

No. 80-1509

THE WASHINGTON POST COMPANY

v.

UNITED STATES DEPARTMENT OF STATE, ET AL., APPELLANTS

No. 80-1606

THE WASHINGTON POST COMPANY

v.

UNITED STATES DEPARTMENT OF STATE, ET AL., APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed Feb. 24, 1981]

Before: LUMBARD *, Senior Circuit Judge for the United States Court of Appeals for the Second Circuit, ROBB and GINSBURG, Circuit Judges

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by Counsel.

On consideration of the foregoing, it is ORDERED AND ADJUDGED by this Court, that the judgment of the District Court appealed from in these cases is hereby affirmed for the reasons set forth in the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: February 24, 1981
Opinion Per Curiam
Concurring Opinion filed by Senior Circuit Judge Lumbard

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 79-2688

No. 80-1509

WASHINGTON POST COMPANY

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., APPELLANTS[†]

And Consolidated Case No. 80-1606

Before: J. Edward Lumbard *, Senior Circuit Judge, United States Court of Appeals for the Second Circuit, Robb and Ginsburg, Circuit Judges

ORDER

On consideration of appellants' petition for rehearing filed on April 9, 1981, it is

---

[†Because the Department of Justice, which represented petitioners in this case, had signed the notice of appeal, the court of appeals inadvertently included the Department as a party in the caption of this order and of the order denying the suggestion for rehearing en banc.]

* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

ORDERED by the Court that appellants' petition for rehearing is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER,
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Filed May 19, 1981

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 79-2288

No. 80-1509

WASHINGTON POST COMPANY,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
APPELLANTS

And Consolidated Case No. 80-1606

Argued 10-23-80

Before: Robinson, Chief Judge, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Appellants' suggestion for rehearing *en banc* has been circulated to the full Court. A majority of the Court has not voted in favor of the suggestion. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Filed May 19, 1981

Circuit Judge Wright did not participate in the foregoing order.

Circuit Judges Tamm, MacKinnon, Robb and Wald would grant appellants' suggestion for rehearing *en banc*.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2688

THE WASHINGTON POST COMPANY, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,
DEFENDANTS

Filed Mar. 11, 1980

ORDER

Upon consideration of the Cross Motions for Summary Judgment the Oppositions thereto, and the entire record herein, it appearing to the Court that (1) Plaintiffs requested, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, information disclosing whether Drs. Ibrahim Yazdi and Ali Behzadnia were ever citizens of the United States, and, if so, whether they have renounced their citizenship or in any way been expatriated, (2) Defendants allege that exemption 6 applies to the information sought, (3) that exemption permits the nondisclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," (4) the standard for judging whether information may be withheld, as enunicated by this circuit is (a) is the information sought akin to information found in personnel or medical files, (b) would disclosure of the information constitute an invasion of privacy, and (c) does the severity of the invasion so outweigh

the public interest in disclosure so as to render it clearly unwarranted, *see Rural Housing Alliance* v. *USDA*, 498 F.2d 73, 76-77 (D.C. Cir. 1974), (5) the information sought is a matter of public record, (6) the public would best be served by disclosure of the information, (7) Defendants have not met their burden of proof under the three pronged test cited above, and therefore (8) the information sought does not fall within exemption 6 of FOIA, it is by the Court this 11th day of March, 1980,

ORDERED, that Plaintiff's Motion for Summary Judgment be and hereby is GRANTED; and it is

FURTHER ORDERED, that Defendants' Motion be and hereby is DENIED.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action 79-2688

THE WASHINGTON POST COMPANY, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF STATE, ET AL., DEFENDANTS

Filed May 16, 1980

ORDER

Upon consideration of Defendant's Motion to Reconsider and Motion for Stay Pending Appeal, and Plaintiff's Motion to Enforce and Motion for Attorney's Fees, the oppositions thereto, and the entire record herein, it is by the Court this 16th day of May, 1980,

ORDERED, that Defendant's Motion for Reconsideration be and hereby is DENIED; and it is

FURTHER ORDERED, that Plaintiff's Motion to Enforce be and hereby is GRANTED; and it is

FURTHER ORDERED, that Defendant's Motion for a Stay Pending Appeal be and hereby is GRANTED; and it is

FURTHER ORDERED, that Plaintiff's Motion for Attorney's Fees be and hereby is STAYED, pending disposition of the appeal.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

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Joint Appendix

Office - Supreme Court, U.S.
FILED
DEC 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-533

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES DEPARTMENT OF STATE, ET AL.,
Petitioners

v.

THE WASHINGTON POST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

PETITION FOR WRIT OF CERTIORARI: FILED SEPTEMBER 15, 1981
WRIT OF CERTIORARI: GRANTED NOVEMBER 9, 1981

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE WASHINGTON POST COMPANY

v.

U.S. DEPARTMENT OF STATE, ET AL.

DOCKET ENTRIES

Date	Proceedings
1979	
Oct. 9	COMPLAINT; appearance; exhibits 1 and 2.
Oct. 9	REQUEST by pltf. for order appointing special process server and Order by Clerk appointing Willie Johner to serve summons and complaint upon all defts.
Oct. 9	SUMMONS (5) and copies (5) of complaint issued:
Oct. 11	AFFIDAVIT of service by special process server on defts. and U.S. Atty. on 10-10-79; exhibits (4).
Oct. 18	AFFIDAVIT of service on U.S. Atty. Gen. on 10-12-79; exhibits 1 and 2.
Nov. 8	ANSWER by defts. to complaint; Exhibit 1.
Nov. 8	CALENDARED. CAL/N.
Nov. 16	ORDER that defts. shall file motion for summary judgment by 12-16-79 (N) Robinson.
Dec. 28	STIPULATION granting defts. until 1-13-80 to file motion for summary judgment and pltfs. response to said motion to be filed by 2-11-80, approved and so ordered. (FIAT) (N) Robinson.

Date	Proceedings
1980	
Jan. 17	MOTION by defts. for summary judgment; statement of undisputed facts; memo of P&A's; exhibits A-H.
Feb. 11	CROSS-MOTION by pltf. for summary judgment; statement of material facts; statement of material facts; affidavit of Paul B. DeWolfe; memo of P&A's; table of authorities; exhibits 1-4.
Mar. 7	MEMORANDUM of P&A's by defts. in opposition to pltfs. cross-motion for summary judgment.
Mar. 11	ORDER granting pltfs. motion for summary judgment; denying defts. motion for summary judgment. (N) Robinson.
Apr. 11	MOTION by pltf. for assessment against the U.S. of pltfs. attorney fees and costs; memo of P&A's; affidavit of Lon S. Babby; affidavit of John B. Kuhns.
Apr. 11	MOTION by pltf. to enforce the final order of March 11, 1980; memo. of P&A's.
Apr. 14	AFFIDAVIT of John B. Kuhns (corrected affidavit); attachment.
Apr. 24	MOTION by defts. for stay of order and of proceedings on pltff.'s motion for assessment against the U.S. for pltff.'s attorney's fees and costs; memo of P & A's; Exhibit A.
May 1	MEMORANDUM of P&A's by pltf. in opposition to defts. motion for a stay.
May 1	MOTION of defts. for reconsideration of the Court's Order of 3-11-80; Memorandum; Exhibit A.
May 1	NOTICE of defts. of in camera inspection.
May 9	NOTICE of appeal by defts. from order of 3-11-80. Govt. no fee. Copy mailed to John B. Kuhns and Lon S. Babby.

Date	Proceedings
1980	
May 9	COPY of notice of appeal and docket entries transmitted to USCA. USCA # 80-1509.
May 12	MEMORANDUM by pltf. in opposition to defts. motion for reconsideration of the Court's order of 3-11-80.
May 19	MEMORANDUM by defts. in response to pltfs. opposition to defts. motion for reconsideration of the Court's order of 3-11-80.
May 14	ONE envelope placed under seal by direction of Court.
May 21	ORDER filed 5-16-80 denying defts. motion for reconsideration: granting pltfs. motion to enforce; granting defts. motion for stay pending appeal; staying pltfs. motion for attorney's fee pending disposition of appeal. (N) Robinson, J.
May 28	NOTICE of appeal by defts from order of May 16, 1980. Govt. [illeg.] fee. Copy mailed to John B. Kuhns and Lon S. Babby.
May 28	COPY of notice of appeal and docket entries transmitted to USCA. USCA #80-1606.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2688

ROBINSON, *J.*

THE WASHINGTON POST COMPANY
1150 15th Street, N.W.
Washington, D.C. 20071, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF STATE
2201 C Street, N.W.
Washington, D.C. 20520

CYRUS R. VANCE
Secretary of State
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520

and

FRANK M. MACHAK
Information and Privacy Coordinator
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520, DEFENDANTS

COMPLAINT FOR INJUNCTIVE RELIEF

JURISDICTION

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, to compel defendants to produce certain records for inspection and copying—namely, any

records indicating whether or not Dr. Ali Behzadnia and/or Dr. Ibrahim Yazdi are citizens of the United States and hold valid United States passports.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1361.

PARTIES

3. Plaintiff THE WASHINGTON POST COMPANY is incorporated in the State of Delaware and has its principal place of business in Washington, D.C. The Newspaper Division of the Washington Post Company publishes *The Washingon Post*, a newspaper of general circulation.

4. Defendant UNITED STATES DEPARTMENT OF STATE (hereinafter "Department of State") is a department of the Executive Branch of the United States Government. It has possession or control of the records to which plaintiff seeks access.

5. Defendant CYRUS R. VANCE is Secretary of State; he is sued in his official capacity as custodian of the requested documents, and as head of the agency in which the requested documents are located.

6. Defendant FRANK M. MACHAK is the Information and Privacy Coordinator for the defendant Department of State and is the official who is charged with the responsibility for administering said Department's compliance with the Freedom of Information Act, including insuring that information requests are responded to in a timely manner.

CAUSE OF ACTION

7. On September 7, 1979, Christopher M. Little, plaintiff's Vice President and Counsel, made an oral request to Rudolf Henderson of the Department of State's Office of Legal Advisers for access to any records indicating whether or not Dr. Ali Behzadnia and/or Dr. Ibrahim Yazdi are citizens of the United States or hold valid

United States passports. Henderson stated that the information would be provided if plaintiff would make a formal written request to the Department of State's Bureau of Public Affairs.

8. By letter dated September 11, 1979, a copy of which is attached as Exhibit 1, plaintiff requested access to any records indicating whether or not Dr. Ali Behzadnia and/or Dr. Ibrahim Yazdi are citizens of the United States and hold valid United States passports. This letter was hand-delivered to defendants by David Simon, a law clerk employed by plaintiff, on September 11, 1979. Robert Tatum of the Department of State's Bureau of Public Affairs assured Simon that the request would be referred to the Department of State's Passport Office for a prompt response.

9. On September 12, 1979, Simon was informed by Tatum that plaintiff's request would be processed in the normal fashion and that a response would likely take two days. Simon then telephoned William Wharton, Director of Department of State's Office of Citizenship and Nationality. Wharton advised Simon that he was reviewing plaintiff's request and would make a recommendation to his superiors. On September 20, 1979, Simon again telephoned Wharton and was told that Wharton had made a recommendation regarding the request to his superiors. Wharton promised to check on the status of the request and report back promptly to Simon.

10. On September 25, 1979, Simon still had not received any indication from Wharton. Simon then telephoned Tatum who stated that the defendants were about to make a decision and that the decision would be made known the following day. By letter dated September 25, 1979, a copy of which is attached as Exhibit 2, Tatum indicated that Department of State's Office of Passport Services was reviewing plaintiff's request for information. Despite additional repeated inquiries by plaintiff on September 27, September 28 and October 2, no further correspondence or notification has been received from the defendants regarding this request.

11. Defendants have failed to notify plaintiff of Department of State's "determination" regarding plaintiff's Freedom of Information Act request, in violation of 5 U.S.C. § 552(a)(6)(A)(i). Defendants have also failed to notify plaintiff of the reasons or rationale for non-compliance with the Freedom of Information Act.

12. Plaintiff is deemed to have exhausted its administrative remedies by virtue of 5 U.S.C. § 552(a)(6)(C).

13. Plaintiff is entitled, pursuant to 5 U.S.C. § 552(a) to inspect and copy the requested records.

WHEREFORE, plaintiff prays that the Court (1) expedite the proceedings in this action, as provided under 5 U.S.C. § 552(a)(4)(D); (2) enjoin defendants, their agents, officers and employees from withholding the records which plaintiff has requested and order defendants to produce the requested documents for inspection and copying; (3) award plaintiff its costs and reasonable attorney's fees in this action, as provided under 5 U.S.C. § 552(a)(4)(E); and (4) grant such other and further relief as the Court may deem just and proper.

WILLIAMS & CONNOLLY

By /s/ John B. Kuhns
JOHN B. KUHNS

/s/ Lon S. Babby
LON S. BABBY

Hill Building
Washington, D.C. 20006
(202) 331-5000
Attorneys for Plaintiff
The Washington Post Company

Dated: October 9, 1979

EXHIBIT 1

THE WASHINGTON POST
1150 15th Street, N.W.
Washington, D.C. 20071
(202) 334-6000

CHRISTOPHER M. LITTLE
VICE PRESIDENT AND COUNSEL
(202) 334-7141

September 11, 1979

Director of Freedom of
Public Affairs
Bureau of Public Affairs
Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Sirs:

I have made an oral request of the Passport Office under the Freedom of Information Act for documents indicating whether Dr. Ali Behzadnia and Dr. Ibrahim Yazdi (first name may be spelled Ebrahim) hold valid U.S. passports. I spoke to Mr. Rudolph Henderson in the Passport Office, and told him that I would accept any record held by the Passport Office indicating whether either of these persons is an American citizen.

Mr. Henderson asked that I make the request in writing to the Office of Public Affairs. By this letter I am making the formal request suggested by Mr. Henderson.

Mr. Henderson raised the question as to whether the information requested is required to be kept confidential by the Privacy Act. I wish to underscore the fact that I am only asking for information which indicates whether or not either of these men is an American citizen. It's not conceivable to me that U.S. citizenship would be considered "an embarrassing" fact which cannot be dis-

closed under the Privacy Act. If any document you have indicating citizenship contains other information which you consider covered by the Privacy Act, that could be deleted.

I am making this formal request under the Federal Freedom of Information Act, 5 U.S.C. § 552(a)(6). I recognize that you have a maximum of ten days in which to provide this information, but in view of the simplicity of the request, I would ask that you supply this information without further delay.

Sincerely,

/s/ Christopher M. Little

EXHIBIT 2

[SEAL]

DEPARTMENT OF STATE
Washington, D.C. 20520

Sep. 25, 1979

Mr. Christopher M. Little
Vice President and Counsel
The Washington Post
1150 15th Street, N.W.
Washington, D.C. 20071

Dear Mr. Little:

This refers to your letter of September 11 concerning your Freedom of Information Act request. The Office of Passport Services is currently reviewing your request for information. I expect a response from that office shortly, at which time I will notify you.

In the meantime, should you have any further questions regarding this matter, please feel free to contact me on 632-5170.

Sincerely,

/s/ Robert M. Tatum
ROBERT M. TATUM
Information and Privacy Staff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2688

THE WASHINGTON POST COMPANY, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,
DEFENDANTS

ANSWER

In response to the numbered paragraphs of the complaint, defendants admit, deny or otherwise aver as follows:

1. This paragraph is a characterization of the action brought by plaintiff and does not require an answer, but insofar as an answer is deemed required, admit.
2. Deny except to admit that this court has jurisdiction of this action under 5 U.S.C. § 552(a)(4)(B).
3. Admit.
4. Admit the first sentence. Deny the allegation contained in the second sentence except to admit that the Department of State has possession of passport applications which have been submitted to it which indicate whether the applicant possessed United States citizenship at the time of the application and of records which show whether a former applicant has had his citizenship revoked.
5. Admit.
6. Admit.
7. Deny the allegations contained in this paragraph except to admit that on September 7, 1979, Mr. Little, in conversation with Mr. Henderson, requested general in-

formation concerning the reasons for the Department of State's denying release of information from passport files and that Mr. Henderson suggested to Mr. Little that he submit a written request to the Bureau of Public Affairs if he desired information.

8. Deny the allegation contained in the first sentence, except to admit receipt of plaintiff's letter of September 11, 1979, a copy of which is attached to the complaint as Exhibit 1, to which the Court is respectfully referred for a complete and accurate statement of the terms thereof. Admit the allegation contained in the second sentence. Deny the allegation contained in the third sentence except to admit that Mr. Tatum stated the request would be processed in the normal course of business.

9. Admit the allegations contained in the first four sentences of this paragraph. Deny the allegations contained in the fifth sentence except to admit that Mr. Wharton stated that he would inform Mr. Simon of the decision made by the responsible individuals when it was made.

10. Admit the first sentence. Admit the second sentence except to deny that Mr. Tatum advised Mr. Simon that a decision would be made known on September 26, 1979. Deny the allegation contained in the third sentence except to admit the transmittal of a letter dated September 25, 1979, a copy of which is attached to the complaint as Exhibit 2, to which the Court is respectfully referred for a complete and accurate statement of the terms thereof. Admit the allegation in the fourth sentence that plaintiff made inquiries of the Department of State on September 27, September 28, and October 2, 1979, but deny the remainder of this sentence and aver that plaintiff was informed of the Department of State's decision denying its request by letter dated October 11, 1979, a copy of which is attached hereto as Exhibit 1.

11. Deny.

12. Admit.

13. Deny.

Defendants deny that plaintiff is entitled to the relief prayed for in this action or to any relief whatsoever.

Defendants deny each and every allegation not heretofore expressly admitted, qualified, or denied by this Answer.

WHEREFORE, defendants pray that the instant action be dismissed with prejudice.

ALICE DANIEL
Acting Assistant Attorney General

CARL S. RAUH
United States Attorney

/s/ Vincent M. Garvey
VINCENT M. GARVEY

/s/ Alan L. Ferber
ALAN L. FERBER
Attorneys, Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-3486
Attorneys for the Defendants.

EXHIBIT 1

Oct. 11, 1979

Mr. Christopher M. Little
The Washington Post
1150 15th Street, N.W.
Washington, D.C. 20071

Dear Mr. Little:

I refer to your request for information concerning Dr. Ali Behzadnia and Dr. Ibrahim Yazdi.

The Freedom of Information Act, 5 U.S.C. 552, which governs your request, enables any individual (United States citizen, permanent resident alien and nonimmigrant alien) to request information from the government. The Act also affords the above persons the protection against invasions of their personal privacy.

The information you requested pertaining to Dr. Yazdi or Dr. Behzadnia must be denied pursuant to 5 U.S.C. 552(b)(6). To release any information on that matter would be "a clearly unwarranted invasion of [the] personal privacy" of these persons.

You are advised of your right to appeal to the Council on Classification Policy of the Department pursuant to Section 6.8 of Part 6 of Title 22 of the Code of Federal Regulations, a copy of which I have enclosed.

Sincerely,

ROBERT E. LAMB
Deputy Assistant Secretary
for Passport Services

Enclosure:

1. As stated

PPT/C/O:RWKott:mav 9/14/79 Clearance:CA/HHoran
Redraft:L/CA:REDalton:L/M:KEMalmborg
Retyped:PPT/C/O:RWKott:mav 10/2/79

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2688

THE WASHINGTON POST COMPANY, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,
DEFENDANTS

STATEMENT OF UNDISPUTED FACTS

Defendants adopt and incorporate by reference as their Statement of Undisputed Facts the affidavit of Assistant Secretary of State Harold H. Saunders, filed herewith as Attachment A to Defendants' Memorandum of Points and Authorities in Support of Their Motion For Summary Judgment.

Respectfully submitted,

ALICE DANIEL
Assistant Attorney General
Civil Division

CHARLES F. C. RUFF
United States Attorney

/s/ Vincent M. Garvey
VINCENT M. GARVEY

/s/ Alan L. Ferber
ALAN L. FERBER

Attorneys, Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-3486
Attorneys for the Defendants.

IN THE UNITED STATES DISTRICT COURT
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DEFENDANTS

AFFIDAVIT OF HAROLD H. SAUNDERS

Harold H. Saunders, deposes and says as follows:

1. I am an officer of the DEPARTMENT OF STATE and have held the position of Assistant Secretary of State for Near Eastern and South Asian Affairs since April 1978. In 1974, I assumed the position of Deputy Assistant Secretary with that same Bureau. In addition, I am the Director of the Iran Working Group at the Department of State which is responsible for the management of Iranian affairs during the current crisis. I have dealt professionally with matters involving Iran since 1961 when I joined the staff of the National Security Council. In 1967 I became a senior member of the Council Staff.

The statements made in this affidavit are true and correct to the best of my knowledge and belief. The statements are based upon information which I have received in my official capacity as Assistant Secretary of State and are submitted to the Court for the purpose of setting forth the reasons the DEPARTMENT OF STATE believes that release of the information requested by the Plaintiff would constitute a clearly unwarranted invasion of the personal privacy of Drs. Yazdi and Behzadnia.

2. In Iran today clear lines of authority are lacking. There is intense anti-American sentiment in Iran and several Iranian revolutionary leaders have been strongly criticized in the press for their alleged ties to the United States. Any individual in Iran who is suspected of being an American citizen or of having American connections is looked upon with mistrust. An official of the Government of Iran who is reputed to be an American citizen would, in my opinion, be in physical danger from some of the revolutionary groups that are prone to violence.

3. Dr. Ibrahim Yazdi left his position as Foreign Minister when the government of Prime Minister Bazargan resigned shortly after the takeover of the American Embassy in Tehran. He has however, I believe, remained a member of the Revolutionary Council and was recently given responsibilities for dealing with the problems of the various regions of Iran.

Dr. Ali Behzadnia was a senior official in the Ministry of National Guidance. We have not received any reports of his activities in some weeks. We do not know whether he retains his official position.

4. It is the position of the Department of State that any statement at this time by the United States Government which could be construed or misconstrued to indicate that any Iranian public official is currently a United States citizen is likely to cause a real threat of physical harm to that person. It is my belief that were there to be a passport file on one or both of these individuals and were the Department of State to announce the existence of such a file, that statement may be interpreted by those in Iran to mean that that individual whose passport file has been confirmed is currently a United States citizen or has some other present connection with the United States. If there were no passport files relating to these individuals and if the Department of State were to indicate this, our refusal in the future to disclose whether or not a passport file exists on the basis of the (b)(6) exemption in a similar Freedom of Information Act case would be tantamount to an admission that such a file existed.

The previous statements are in no way indicative of the current or past United States citizenship status of Dr. Yazdi and Behzadnia, but relate to them solely because they are the individuals concerned in this action.

5. In deciding that the (b)(6) provision is applicable in this case, the Department of State has balanced the right to privacy of Drs. Yazdi and Bahzadnia against the public interest in the disclosure of the information sought. We believe that for the reasons stated above, the balance is clearly in favor of non-disclosure regardless of whatever information concerning the citizenship status of the individuals may currently be in the public domain.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 14, 1980.

/s/ Harold H. Saunders
HAROLD H. SAUNDERS

EXHIBIT B

LAW OFFICES
WILLIAMS & CONNOLLY
HILL BUILDING
Washington, D.C. 20006

Area Code 202
331-5000

October 12, 1979

Assistant Secretary of State For Public Affairs
Chairman, Council of Classification Policy
Department of State
Washington, D.C. 20520

Re: *Freedom of Information Act Appeal*

Dear Sir:

This firm represents the Washington Post Company in connection with a Freedom of Information Act request. On September 7, 1979, Christopher M. Little, Vice President and Counsel of the Washington Post Company, made an oral request to Mr. Rudolf Henderson of the Department of State's Office of Legal Advisers for access to any records indicating whether or not Dr. Ali Behzadnia and/or Dr. Ibrahim Yazdi are citizens of the United States or hold valid United States passports. The request was renewed in writing by letter dated September 11, 1979. (A copy of that letter is attached.)

Despite repeated inquiries by the Post, and despite the State Department's repeated promises of a prompt response to the request, none was forthcoming within the required 10-day statutory period. As such, on October 9, 1979, we instituted an action in the United States District Court seeking access to the above described records. On October 11, 1979, two days after the filing of the complaint, we received a letter from Robert E. Lamb, Deputy Assistant Secretary for Passport Services, denying the request. (A copy of that letter is attached.)

This letter will serve as an appeal from the denial of the Washington Post Company's request for any records indicating whether or not Dr. Ali Behzadnia and/or Dr. Ibrahim Yazdi are citizens of the United States or hold valid United States passports. We take this appeal in order to provide the Department with a full opportunity to comply with our request.

Mr. Lamb's letter indicates that our request was denied on the basis of 5 U.S.C. § 552(b)(6), which provides for a very limited exemption from disclosure of records "which would constitute a clearly unwarranted invasion of personal privacy." We maintain that this exemption is clearly inapplicable to a request as to whether two individuals are citizens of the United States. As the Supreme Court stated in *Department of Air Force* v. *Rose*, 425 U.S. 352, 382 (1976), "Exemption 6 does not protect against disclosure every incidental invasion of privacy —only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy." When the public's interest in knowing whether an individual is a United States citizen is balanced against any incidental privacy interests of the individuals involved, the clear weight of the balance favors disclosure.

We fully expect that upon examination of the Washington Post's request, the Council on Classification Policy will conclude that the information sought is not within Exemption 6 and will make the information promptly available. If not, we will persist in our lawsuit, which was properly filed because of the Department's failure to provide the requested records or even to respond to the request in a timely manner, and which is in no way prejudiced by the taking of this appeal.

Very truly yours,

/s/ John B. Kuhns
JOHN B. KUHNS

/s/ Lon S. Babby
LON S. BABBY

Attorneys for
Washington Post Company

EXHIBIT C

[SEAL]

DEPARTMENT OF STATE
Washington D.C. 20520

October 23, 1979

Messers. John B. Kuhns and
Lon S. Babby
Law Offices
Williams & Connolly
Hill Building
Washington, D.C. 20006

Dear Messers. Kuhns and Babby:

This will acknowledge receipt of your appeal to the Council on Classification Policy for the release of material withheld in the course of Mr. Little's Freedom of Information Act request.

In accordance with the Rules & Regulations of the Department of State you may expect to have your appeal placed before the Council for the Department's final opinion at the earliest possible time. The Council's findings will be furnished to you in writing by its Chairman.

Sincerely,

BARBARA ENNIS
Director, Policy Development
and Coordination Staff
Classification/Declassification
Center
Bureau of Administration

EXHIBIT D

[SEAL]

DEPARTMENT OF STATE

Washington D.C. 20520

Dec. ~~Oct.~~ 12, 1979

Messers. John B. Kuhns and
Lon S. Babby
Law Offices
Williams & Connolly
Hill Building
Washington, D.C. 20006

Dear Sirs:

I refer to your letter of October 12, on behalf of the *Washington Post* Company, formally appealing the denial by the Deputy Assistant Secretary for Passport Services of a request for information concerning Dr. Ali Behzadnia and Dr. Ibrahim Yazdi (No. 7902711).

Review of this case shows that by letter of September 11, Mr. Christopher M. Little, Vice President and Counsel of the *Washington Post*, sought under the Freedom of Information Act any documents indicating whether Drs. Behzadnia and Yazdi hold valid United States passports, or any record indicating whether either of these persons is an American citizen. In his response of October 11, the Deputy Assistant Secretary for Passport Services stated that the request must be denied pursuant to the provisions of 5 USC 552(b)(6). The letter noted that release of any information on that matter would be a clearly unwarranted invasion of the personal privacy of these persons.

The Appeals Review Panel has reviewed carefully the initial denial in this case, in light of the authorities you cite

in support of your position, as well as all other legal authorities governing the provisions of 5 USC 552(b)(6). The Panel has concluded that the privacy interests to be protected are not incidental ones, but rather are such that they clearly outweigh any public interests which might be served by release of the requested information. Further, it is the view of the Panel that a denial in this case would not be contrary to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny.

Therefore, the Panel has determined that the denial of the requested information must be upheld in this case.

I regret the delay you have experienced awaiting the outcome of the Panel's deliberations.

Sincerely,

/s/ William D. Blair, Jr.
WILLIAM D. BLAIR, JR.
Deputy Assistant Secretary
for Public Affairs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2688

THE WASHINGTON POST COMPANY
1150 - 15th Street, N.W.
Washington, D.C. 20071, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF STATE
2201 C Street, N.W.
Washington, D.C. 20520

CYRUS R. VANCE
Secretary of State
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520

and

FRANK M. MACHAK
Information and Privacy Coordinator
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520
DEFENDANTS

STATEMENT OF MATERIAL FACTS AS TO WHICH PLAINTIFF THE WASHINGTON POST COMPANY CONTENDS THAT THERE IS NO GENUINE ISSUE

Pursuant to Rule 1-9(h) of the Civil Rules of this Court, plaintiff The Washington Post Company states that it contends that there is no dispute as to any of the following material facts:

Freedom of Information Act Request

1. Following an oral request on September 7, 1979, The Washington Post Company, by letter dated September 11, 1979, made a written request to the Department of State, pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a), for access to any records indicating whether or not Dr. Ali Behzadnia and/or Dr. Ibrahim Yazdi are citizens of the United States and hold valid United States passports. (Complaint, Ex. 1; Complaint, paras. 7-8).

2. No determination regarding this Freedom of Information Act request was received by the Washington Post as of October 9, 1979. (Complaint, paras. 8-11).

3. This lawsuit was commenced on October 9, 1979. By letter dated October 11, 1979, the defendants denied the *Post*'s FOIA request claiming that disclosure of the citizenship of Drs. Behzadnia and Yazdi "would be 'a clearly unwarranted invasion of [the] personal privacy' of these persons," and hence was exempted from disclosure by 5 U.S.C. § 552(b)(6). (Answer, Exhibit 1).

4. In order to provide the Department of State with a full opportunity to comply with plaintiff's request, The Washington Post, by letter dated October 12, 1979, appealed the initial denial of its request. (Government's Memorandum, Exhibit B). By letter dated December 12, 1979, this appeal was denied, again on the basis that the information was exempted from disclosure by 5 U.S.C. § 552(b)(6). (Government's Memorandum, Exhibit D).

Public Nature of Information Requested

5. On October 4, 1979, prior to the filing of this action and prior to the denial of the *Post*'s FOIA request, the *Post* reported the following with respect to Dr. Yazdi:

> "Yazdi apparently sensitive to domestic criticism of his 17-year residence in the United States before

the revolution, flatly denied reports that he is an American citizen."

"According to the U.S. Immigration and Naturalization Service, Yazdi was admitted as a permanent U.S. resident in July 1962 and became a naturalized American citizen on March 19, 1971. The agency said Yazdi has not yet renounced his U.S. citizenship."

(Plaintiff's Memorandum, Exhibit 4).

6. In order to become a naturalized citizen, an individual must file a Petition for Naturalization with the clerk of a naturalization court. (8 U.S.C. § 1445). The final hearing on that Petition for Naturalization "shall be had in open court." 8 U.S.C. § 1447. The Petition for Naturalization and the date upon which it is granted are on permanent file with the court. Thus, the fact that an individual has become a naturalized citizen is evidenced by an official record *which is available for public inspection.* (Affidavit of Paul B. DeWolfe, ¶ 3.)

7. When a naturalized citizen, either voluntarily renounces his United States citizenship or becomes expatriated in some other way, the Department of State issues a Certificate of Loss of Nationality. 22 C.F.R. § 50.41. By regulation, the Department of State is required to provide that Certificate of Loss to the Immigration and Naturalization Service. 22 C.F.R. § 50.41(d); § 50.50. Pursuant to its Operating Instructions, INS is, in turn, required to notify the clerk of the naturalization court where the individual was naturalized of the individual's loss of nationality. (INS Operating Instructions, § 349.1, a copy of which is attached to Plaintiff's Memorandum as Exhibit 1). This notification to the court is made on INS form CO-52, a copy of which is attached to Plaintiff's Memorandum as Exhibit 2. CO Form 52 directs the clerk of the court to place the form indicating loss of nationality with the record of naturalization and to note the clerk's index accordingly. The original Petitior

For Naturalization, the amended index, and CO Form 52, indicating loss of nationality, are permanent court records *available for public* inspection. Affidavit of Paul B. DeWolfe, ¶¶ 4-6); Letter from Keith C. Williams, Deputy Assistant Commissioner, Immigration and Naturalization Service, to Lon S. Babby, dated February 1, 1980. (Plaintiff's Memorandum, Exhibit 3).

Respectfully submitted

WILLIAMS & CONNOLLY

By /s/ John B. Kuhns
JOHN B. KUHNS

/s/ Lon S. Babby
LON S. BABBY

Hill Building
Washington, D.C. 20006
(202) 331-5000

Attorneys for Plaintiff
The Washington Post
Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2688

THE WASHINGTON POST COMPANY
1150 - 15th Street, N.W.
Washington, D.C. 20071, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF STATE
2201 C Street, N.W.
Washington, D.C. 20520

CYRUS R. VANCE
Secretary of State
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520

and

FRANK M. MACHAK
Information and Privacy Coordinator
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520, DEFENDANTS

AFFIDAVIT OF PAUL DEWOLFE

CITY OF WASHINGTON

ss:

DISTRICT OF COLUMBIA

PAUL B. DeWOLFE, being first duly sworn, deposes and states that the assertions of fact contained in this affidavit are true to the best of his knowledge, information and belief:

1. I am a member of the bar of the State of Georgia, having been admitted in June 1979.

2. I am employed as a research assistant in the library of Williams & Connolly.

3. In connection with the above-captioned case, on February 1, 1980, I inspected the naturalization records available for public inspection in room 1824 of the United States District Court of the District of Columbia. The following records were available for public inspection.

A. Index—For each person naturalized in the District of Columbia, there is available for public inspection an index card indicating the number of the individual's Petition for Naturalization and the date that petition was granted. I was informed by Deputy Clerk Virginia Woo that this index is arranged alphabetically by the name of the individual naturalized.

B. Petition for Naturalization—For each person naturalized, there is available for public inspection that person's Petition for Naturalization; included on the Petition is the date when the Petition was granted. Deputy Clerk Woo informed me that these records are maintained in books arranged by the identifying number of the Petition.

4. Deputy Clerk Woo was unfamiliar with the Court's procedures for records regarding loss of nationality. On February 4, 1980, I telephoned James F. Davey, Clerk, United States District Court for the District of Columbia. Mr. Davey first stated that he did not have any personal knowledge of the procedure that the court would follow when INS CO Form 52, indicating loss of citizenship, is received but he indicated that he would check on it and call me back. After twenty minutes, he called back and stated that upon checking with the court's attorney at Immigration and Naturalization Service, he could say for certain that the records regarding loss of citizenship would be available for public inspection. He indicated that they would attach the loss of citizenship form (CO Form 52) to the petition and cross-index that information on the general index file.

5. On Friday, February 1, I telephoned Jean Azure, Deputy Clerk, Naturalization Office of the United States District Court for the Southern District of New York. I asked her what procedures are followed when the court receives notification that a naturalized citizen has renounced or otherwise lost citizenship. She told me that when INS Form C0-52, indicating loss of nationality, is received she attaches it to the individual's original Petition for Naturalization and notes the fact of loss of citizenship on the index card in the general index file. She stated that the Petition for Naturalization, the amended index card, and INS Form C0-52 are available for public inspection.

6. On Monday, February 4, I telephoned Margaret Clifford, Deputy Clerk, Naturalization Office, United States District Court for the Eastern District of Virginia and Mrs. Allen, Deputy Clerk, Naturalization Office, United States District Court for the District of Maryland. In response to the same questions posed to Ms. Azure, each stated that she attaches the loss of citizenship form to the original Petition for Naturalization and makes a notation on the card in the index file that the subject is no longer a citizen. These records are available for public inspection.

/s/ Paul B. DeWolfe
PAUL B. DEWOLFE

Subscribed and sworn to before me this
11th day of February, 1980.

/s/ Margaret A. Van Sant
Notary Public, D.C.

My Commission Expires: Feb. 14, 1982

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Washington, D.C.

CURRENT LAWS
TITLE 8, CODE OF FEDERAL REGULATIONS
OPERATIONS INSTRUCTIONS
AND
INTERPRETATIONS

Edition of December 24, 1952,
revised July 1, 1955

(6-21-72)

349.1 *Reports of expatriation.* When a final determination is made that a person who was naturalized or issued a certificate of citizenship has become expatriated, that decision shall promptly be reported to the Central Office in order that the clerk of the naturalization court may be notified and notation made in the Central Office file. The report shall give the person's name; certificate number; date, court, and place of naturalization; and other identifying data.

In an exclusion case, where no appeal is taken from the special inquiry officer's decision, the report shall be submitted immediately. Where the subject appeals, the report shall be submitted when decision has been rendered on appeal.

349.2 *Japanese renunciations of nationality; effectiveness.* A Japanese renunciant who applies to the Service for a privilege or right available only to a United States citizen, and who claims that his renunciation is void under the decision in Acheson v. Murakami (C.C.A. 9, 1949), 176 F.2d 953, shall submit the affidavit on Form N-576 and letter to the field office of the Service in which the claim is pending. The field office will transmit the affidavit and letter to the Civil Division with a covering memorandum indicating the Service interest in the claim. The Civil Division will determine whether the case comes within the Murakami decision and advise the Service field office which, in turn, will determine the applicant's eligibility for the privilege or right sought and inform the Civil Division of its decision.

If an applicant has previously been held to be a United States citizen under the Murakami decision, or it is established that he was under 21 years of age at the time of renunciation, he may be regarded

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Washington, D.C. 20536

Clerk of Court

Dear Sir:

This office is in possession of information showing that the person named below has lost United States citizenship since the date of naturalization.

Please place this communication with the record of the naturalization, and note your index accordingly. If there should be any requests for information concerning naturalization or loss of citizenship, please refer them to this office for attention and appropriate disposition.

Name:

Certificate No.:

Petition No.:

Date of Naturalization:

Sincerely yours,

Stanley E. McKinley
Associate Commissioner
Management

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Washington, D.C. 20536

[illegible]

Please Address Reply to
And Refer to this File No.
CO 300-C

February 1, 1980

Mr. Lon S. Babby, Esquire
Williams and Connally
839 17th Street, N.W.
Washington, D.C. 20006

Dear Mr. Babby:

This will confirm our phone conversation this date concerning the interpretation of the last sentence on our CO Form 52. The language is not intended to prevent the Clerk of Court from disclosing the fact of loss of citizenship. It merely suggests that the Clerk refer requests for the details to this office.

CO Form 52 is intended to avoid a Court's certifying a naturalization without knowledge that the person is no longer a citizen.

Sincerely,

/s/ Keith C. Williams
KEITH C. WILLIAMS
Deputy Assistant Commissioner
Naturalization

Enclosure

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FOREIGN MINISTER DENIES IRAN SEEKS TO EXPORT REVOLUTION

Oct. 4, 1979

By William Branigin

Washington Post Staff Writer

NEW YORK—Despite statements to the contrary by representatives of Ayatollah Ruhollah Khomeini, Iran does not seek to export its revolution to the Arab monarchies in the Persian Gulf, according to Iranian Foreign Minister Ibrahim Yazdi.

His statement contradicted recent speeches by senior Moslem clergymen in Khomeini's entourage condemning the rule of the Gulf's Arab monarchs, who adhere to the Sunni sect of Islam, and implicitly encouraging their Shiite Moslem populations to rise against them.

In an interview, Yazdi also reacted sharply to news that the American charge d'affaires in Tehran delivered a protest to the government there over the recent executions of three Iranian senators who served under ousted Shah Mohammed Reza Pahlavi.

Although administration officials have said U.S.-Iranian relations are improving, Yazdi described them as "very cool." His remarks coincided with a harsh denunciation of the U.S. charge, Bruce Laingen, by the newspaper of Khomeini's Islamic Republican Party and the state-run radio.

According to informed sources, the State Department recommended that Laingen, a former ambassador to Malta, be promoted to that rank in Tehran, succeeding William Sullivan, who left the post earlier this year. But Laingen's appointment had not yet been approved by the White House, the sources said. The vitriolic criticism of Laingen lately would appear to color the prospects for the Tehran government's acceptance of him. A previous

U.S. appointee, Walter Cutler, was rejected by Iranian authorities.

Yazdi brought up his country's complaint about Laingen in a one-hour meeting Wednesday night with Secretary of State Cyrus Vance. It was the first meeting between the two. They had what State Department spokesman Tom Reston characterized as "cordial and frank" discussions. Reston said the question of diplomatic representation was not raised during the talks.

Yazdi, in New York to address the U.N. General Assembly, indicated during the interview that Moslem clergymen in Khomeini's entourage were speaking as individuals in their speeches on exporting revolution and not on behalf of the leadership.

So far, Khomeini, the leader of the Shiites who make up a majority of Iran's population, has restricted his own statements on the subject to general calls for the spread of Islamic rule around the globe and the overthrow of unnamed "anti-Moslem" despots. But he has not repudiated the statements of his fellow clergymen.

"Revolution is not something that you can export to other countries," Yazdi said. He added: "We have to differentiate between two things. One is the normal and natural impact of our revolution in other countries. This is understandable and nobody can blame the Iranians because they have made a revolution and as a result of the Iranian revolution people from this or that country got some idea. They were inspired by the Iranian revolution, and now they want to go ahead and intensify their activities. That's up to those people.

"The other point is whether the . . . Islamic government in Iran has any intention or any plan to export revolution to other countries. The answer is no, not at all."

This appeared to conflict with a recent speech in which Ayatollah Hossein Ali Montazeri, believed to be the most powerful religious figure in Khomeini's entourage, declared, "We will export our Islamic revolution to all the Moslem countries of the world."

In recent weeks, Iranian clergymen have stepped up their campaign to rally Shiites to Iranian revolutionary doctrines in the Gulf, leading to the expulsions of Khomeini representatives by Kuwait, the United Arab Emirates and Bahrain.

The oil sheikdoms evidently fear unrest of the kind that led to the overthrow of the shah earlier this year. The alarm is greatest in Bahrain, where Shiites are in the majority. Also upsetting have been indications that the Islamic republic might renew Iran's claim—renounced by the shah—to Bahrain.

The clergymen's campaign appeared to acquire more weight with Ayatollah Sadegh Rouhani, reportedly a member of Iran's secret Revolutionary Council, sharply denounced the emir of Bahrain at a recent ceremony presided over by Khomeini.

Roubani said that if the emir does "not want to stop oppressing the people and restore Islamic laws, we will call on the people of Bahrain to demand annexation to the Islamic government of Iran."

Asked what the aim of Rouhani's remarks were, Yazdi replied, "Iran is a democratic republic and people are free to express their opinions. If any government is popular and supported by the people, it should not worry about these statements."

Yazdi also angrily denounced "incorrect" coverage of Iranian developments depicting an increasingly totalitarian attitude toward dissident political parties, newspapers and minority groups. He also criticized what he said were human rights violations in the United States.

On Laingen's protest, Yazdi said, "What does he have to protest? We may also notify them [the Americans] that we don't like the way they treat many of their citizens: blacks, Mexicans, Indians."

Yazdi, apparently sensitive to domestic criticism of his 17-year residence in the United States before the revolution, flatly denied reports that he is an American citizen.

According to the U.S. Immigration and Naturalization Service, Yazdi was admitted as a permanent U.S. resident in July 1962 and became a naturalized American citizen on March 19, 1971. The agency said Yazdi has not yet renounced his U.S. citizenship.

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UNITED STATES DEPARTMENT OF STATE, ET AL.,
DEFENDANTS

DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S ORDER OF MARCH 11, 1980

Defendants, by their undersigned counsel, hereby move for reconsideration of the Court's Order of March 11, 1980 pursuant to Federal Rules of Civil Procedure Rule 60(b). In support of this motion, the Court is respectfully referred to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

ALICE DANIEL
Assistant Attorney General

CHARLES F. C. RUFF
United States Attorney

/s/ Vincent M. Garvey
VINCENT M. GARVEY

/s/ Alan L. Ferber
ALAN L. FERBER
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Washington, D.C. 20530
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Attorneys for Defendants

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2688

THE WASHINGTON POST COMPANY, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,
DEFENDANTS

SUPPLEMENTAL AFFIDAVIT OF HAROLD H. SAUNDERS

Harold H. Saunders, deposes and says as follows:

1. I am an officer of the Department of State and have held the position of Assistant Secretary of State for Near Eastern and South Asian Affairs since April 1978. In 1974, I assumed the position of Deputy Assistant Secretary for Near Eastern and South Asian affairs. In addition, I am the Director of the Iran Working Group at the Department of State which is responsible for the management of Iranian affairs during the current crisis. I have dealt professionally with matters involving Iran since 1961 when I joined the staff of the National Security Council. In 1967 I became a senior member of the Council staff.

The statements made in this affidavit are true and correct to the best of my knowledge and belief. The statements are based upon information which I have received in my official capacity as Assistant Secretary of State and are submitted to the Court for the purpose of supplementing my affidavit to the Court of January 14, 1980 which sets forth the reasons the Department of State believes that release of the information requested by the

Plaintiff would constitute a clearly unwarranted invasion of the personal privacy of Drs. Yazdi and Behzadnia.

This affidavit is tendered in addition to a classified *in camera* affidavit which states essentially the same points and which I also executed on this date.

2. Since my affidavit of January 14, Dr. Yazdi has been elected to the National Assembly which is the Iranian parliament. We have had no information about Dr. Behzadnia's activities in months.

3. There continues to be intense anti-American sentiment in Iran and several revolutionary leaders have been strongly criticized in the press for their alleged ties to the United States. Any person suspected of having such a connection would likely be subject to severe scrutiny, suspicion and possible harm. Examples of how this anti-American attitude has jeopardized those Iranians whose names have been publicly linked to the United States are cited below. In each of the cases mentioned, the militant occupiers of the U.S. Embassy released documents, purportedly taken from U.S. Embassy files, which recorded routine and occasional contacts and conversations between various Iranians and Embassy officials. The militants charged that these contacts were "proof" of American espionage activities. The individuals whose names appeared in these Embassy reports were branded "agents" of the U.S.

The *in camera* affidavit at this point set out four examples in support of the proposition in the preceding paragraph.

4. When viewed against this background any comment, positive or negative, by the Department of State relative to the current American citizenship status of Dr. Yazdi and Dr. Behzadnia would have results which constitute a serious threat to their personal privacy, safety, and well-being.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 22, 1980.

/s/ Harold H. Saunders
HAROLD H. SAUNDERS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 70-2688

THE WASHINGTON POST COMPANY, PLAINTIFF
v.
UNITED STATES DEPARTMENT OF STATE, ET AL.,
DEFENDANTS

NOTICE OF IN CAMERA SUBMISSION

PLEASE TAKE NOTICE that in support of Defendants' Motion for Reconsideration, defendants are submitting to the Court for its *in camera, ex parte* consideration the unexpurgated version of the supplemental Affidavit of Assistant Secretary of State Harold H. Saunders, the unclassified version of which is attached to the Memorandum of Points and Authorities in Support of Defendants' Motion for Reconsideration as Exhibit A. The classified version of said affidavit submitted for the Court's *in camera* inspection contains specific examples of Iranian political figures who have suffered harm as a result of alleged American contacts and notes the political position and beliefs of Dr. Ibrahim Yazdi.

Respectfully submitted,

ALICE DANIEL
Assistant Attorney General
CHARLES F. C. RUFF
United States Attorney

/s/ Vincent M. Garvey
VINCENT M. GARVEY

/s/ Alan L. Ferber
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SUPREME COURT OF THE UNITED STATES

No. 81-535

UNITED STATES DEPARTMENT OF STATE, ET AL.,
PETITIONERS

v.

THE WASHINGTON POST COMPANY

ORDER ALLOWING CERTIORARI

Filed November 9, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 359021 729

Opposition

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Office - Supreme Court, U.S.
FILED
OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-535

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

UNITED STATES DEPARTMENT OF STATE, *et al.*,
Petitioners,

v.

THE WASHINGTON POST COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the courts below correctly held that United States naturalization records, encompassing as they do public judicial proceedings in which the new citizen takes an oath of allegiance to this country, are not exempted from mandatory disclosure by the personal privacy exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(6), which authorizes non-disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

RULE 28.1 LISTING

The following are subsidiaries of respondent The Washington Post Company: Newsweek, Inc. (wholly owned subsidiary); Newsweek Services, Inc. (wholly owned second-level subsidiary); Post-Newsweek Stations, Inc. (wholly owned subsidiary); Post-Newsweek Stations, Florida, Inc. (wholly owned second-level subsidiary); Post-Newsweek Stations, Connecticut, Inc. (wholly owned second-level subsidiary); Post-Newsweek Stations, Michigan, Inc. (wholly owned second-level subsidiary); Top Market Television, Inc. (wholly owned second-level subsidiary; Bowater Mersey Company Ltd. (49% ownership); Robinson Terminal Warehouse Corp. (85% ownership); Los Angeles Times-Washington Post News Service (50% ownership); Postrib Corporation (50% ownership); International Herald Tribune, S.A. (30% ownership); Trenton Times Corporation (wholly owned subsidiary); The Daily Herald Company (wholly owned subsidiary); Newsprint, Inc. (wholly owned subsidiary); and Publisher's Phototype, Inc. (24% ownership).

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IN THE

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OCTOBER TERM, 1981

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UNITED STATES DEPARTMENT OF STATE, *et al.*,
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v.

THE WASHINGTON POST COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REASONS FOR DENYING THE WRIT

The Government's lengthy certiorari petition almost succeeds in obscuring the critical finding of the district court, affirmed by the court of appeals, that Freedom of Information Act disclosure should be had here, *inter alia*, because "the information sought is a matter of public record." Petition at 13a.[1] Indeed, throughout this

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[1] In his concurring opinion below, Judge Lumbard explicitly agreed, simply noting that such naturalization and citizenship information was sometimes difficult to find: "while such information is a matter of public record on file in various federal district courts across the country, the information is difficult to locate." Petition at 5a.

litigation, the Government has not disputed that the requested information—whether two individuals were ever naturalized as United States citizens, and, if so, whether they remain American citizens today—is public record information.

In its apparent eagerness to launch this Court on a sweeping review of subsection (b)(6) of the Act, 5 U.S.C. § 552(b)(6), the Government has written a voluminous treatise in support of a singularly inappropriate vehicle. What is at issue in this case is simply an FOIA request by respondent for facts relating to two individuals concerning these persons' United States citizenship. Such status is a "public" fact in the sense that it is and must be disclosed regularly in all sorts of public and private transactions concerning travel, taxes, and business. No legitimate expectation of privacy can attach to it.[2] The court below held that such fact was not privileged from disclosure under the "similar files" part of the (b)(6) exemption ("personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy") because the recorded data did not "incorporate 'intimate details' about an individual, information ' "of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records." ' " Petition at 2a-3a. We respectfully submit that the court's conclusion was correct and in accord with the precedents of this Court and of other Circuits.

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[2] Citizenship is such a fundamental right that it "is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers." *Trop* v. *Dulles*, 356 U.S. 86, 92 (1958) (plurality opinion of Chief Justice Warren for the Court). Citizenship is not a private matter. It defines an individual's privileges and obligations in a political community and thus his public relationship with other members of that political community. This is particularly so for naturalized citizens, who by law are required to declare allegiance to their fellow citizens in open court. 8 U.S.C. § 1448. See *infra* at 3.

The Government nowhere denies that had respondent's reporters been present at the final naturalization proceedings of Dr. Yazdi and Dr. Behzadnia (assuming, of course, that such proceedings occurred), they could have reported with impunity the very facts now sought in this FOIA request. The final step in the naturalization process is the public Oath of Allegiance to the United States, required to be before a judge in open court.[3] 8 U.S.C. § 1447(a) provides:

> "Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the petitioner and the witnesses . . . shall be examined under oath before the court and in the presence of the court. If the petitioner is prevented by sickness or other disability from being in open court for the final hearing upon a petition for naturalization, such final hearing may be had before a judge or judges of the court at such place as may be designated by the court."

The Government lamely tries to gloss over this difficult problem of how any reasonable privacy expectation may attach to proceedings in open court by suggesting that the information could only be located "with some effort" from the public records. Petition at 16 n.9. Of course, the precise purpose of the FOIA is to facilitate access

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[3] To become a naturalized citizen, an individual must file with the clerk of the naturalization court a Petition for Naturalization, 8 U.S.C. § 1445. The statute provides that the final hearing on that petition "shall be had in open court", 8 U.S.C. § 1447, and that an oath of allegiance be taken "in open court", 8 U.S.C. § 1448. The Petition for Naturalization and the date upon which it was granted become permanent court records available for public inspection at the naturalization court. 8 U.S.C. § 1447(a); 8 U.S.C. § 1450(e). *See* Affidavit of Paul B. DeWolfe, C.A. App. 59-61.

to governmental information. The real question, however, is whether any privacy interest, akin to that involved in highly personal and intimate medical and personnel files, attaches to public naturalization ceremonies.[4]

In a number of different contexts, this Court has held that privacy expectations diminish radically when even highly intimate facts are revealed in open judicial pro-

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[4] Throughout this litigation the Government has tried to divert attention from the dispositive fact that the requested naturalization information is neither highly personal nor sufficiently intimate to qualify for Exemption 6 protection. Rather, the Government has raised the spectre that disclosure could possibly result in physical harm. Respondent, on the other hand, has argued that the possible misuse of this information by others has no bearing on whether a sufficient privacy interest attaches to the information to exempt it from FOIA disclosure.

As the courts below concluded, the FOIA simply does not authorize government officials to withhold otherwise discloseable information on the basis of the possible and remote contingency of untoward consequences due to the revelation of such information. In *Simpson* v. *Vance*, the court recognized that potentially adverse consequences have no bearing on the privacy exemption, because possible misuse by others "does not change the personal quality of the information contained in the materials at issue. . . ." 648 F.2d 10, 17 (D.C. Cir. 1980). In the present case, the court reaffirmed that conclusion and reiterated that "[T]he Department is attempting to fit a square peg in a round hole . . . ." Petition at 4a.

Mr. Saunders' affidavits, upon which the Government relies, do not address the personal quality of the requested information. Moreover, far from being "unrebutted" (Petition at 9), respondent has contended that, to the extent it has any relevence at all, Mr. Saunders' opinion is demonstrably false and the fears expressed exaggerated. For, as respondent has shown, it reported before the filing of this lawsuit and more than three months before Mr. Saunders' affidavits that Dr. Yazdi was, according to the Immigration and Naturalization Service, a naturalized American citizen. The fears expressed by Mr. Saunders have not materialized as a result of the publication of this information, and indeed, Yazdi's responsibilities in Iran were increased since publication.

ceedings. In a state tort privacy action, for example, this Court ruled that a State may not "impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491 (1975). It noted that "[t]he developing law surrounding the tort of invasion of privacy recognizes a privilege in the press to report the events of judicial proceedings," *id.* at 493, and recognized that "the interests in privacy fade when the information involved already appears on the public record," *id.* at 494-95. Likewise, in *Oklahoma Publishing Co.* v. *District Court in and for Oklahoma County, Oklahoma*, 430 U.S. 308, 310 (1977), the Court held that a State could not "prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public." Numerous other decisions of the Court are premised on the theory that the press has a right to report what occurs in "open court" and that no legitimate privacy right attaches to such information. *See, e.g., Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 568 (1976) (gag order prohibiting publication of evidence revealed in open court "plainly violated settled principles"); *Sheppard* v. *Maxwell*, 384 U.S. 333, 362-63 (1966) ("there is nothing that proscribes the press from reporting events that transpire in the courtroom"); *Craig* v. *Harney*, 331 U.S. 367, 374 (1947) ("[t]hose who see and hear what transpired [in the courtroom] can report it with impunity"). *Cf. Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 838-40 (1978). That same analysis requires disclosure here because Congress has required that the process of naturalization occur in open court. The public fact of naturalization does not become transformed simply because it is recorded in the files of the Department of State.

The Government's lengthy analysis of the legislative history of (b)(6) does not impugn the decision of the court below. The legislative record is hardly crystalline, but as this Court has observed, "the primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters in such files as those maintained by the Department of Health, Education, and Welfare, the Selective Service, and the Veterans' Administration." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 375 n.14 (1976). The Court also observed that "[t]he legislative history is clear that Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." *Id.*, 425 U.S. at 380 n. 19. It is only those files containing "personal" or "intimate" details which may in some reasonable sense be characterized as analogous to "personnel" and "medical" files which fall under the "similar files" exemption of (b)(6).[5] There is no support, either in the legislative history the Government quotes or elsewhere, for the proposition that Congress intended federal agencies to have a roving commission to withhold whatever files seemed to the agencies to invade some amorphous "privacy" interest. The Act repeatedly states "that official information shall be made available 'to the public,' 'for public inspection.'" *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 79 (1973). "'These [nine] exemptions are explicitly made

[5] The legislative history quoted by the Government is replete with phrases that could not possibly apply to records deriving from open court naturalization proceedings: "the protection of an individual's private affairs," Senate Report, S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965), quoted in Petition at 13; "highly personal" records, *id.*, quoted in Petition at 14; "intimate details," House Report, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), quoted in Petition at 14; "information about an individual which he could reasonably assert an option to withhold from the public at large," Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (1975) at 9-10, quoted in Petition at 15 n. 8.

exclusive' . . . and must be narrowly construed." *Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 361. The Government's concerns, as expressed in the petition for certiorari, are more properly addressed to Congress than to this Court, for there is simply not now in the Act the kind of broad and discretionary exemption espoused by the Government.

Nor is the decision below "startling," Petition at 9, "inconceivable," *id.*, or inconsistent with *Department of the Air Force* v. *Rose*, *supra*. In that case this Court rejected the Government's argument that personnel and medical files were *per se* non-discloseable and, relying heavily on FOIA cases from the District of Columbia Circuit,[6] ruled that as to these files and "similar" files, a court must engage in a balancing process, weighing the public and private interests involved if the files were disclosed under the Act. 425 U.S. at 373. The Court held that Air Force Academy disciplinary files were "similar files" for (b)(6) purposes because of the manner in which the cadet hearings had been conducted ("all matters discussed at the hearing are confidential and should not be discussed outside the room," *id.* at 359), because disciplinary decisions were closely akin to "personnel" decisions, *id.* at 376, and because the disclosure of such files "implicates similar privacy values [to those attaching to personnel files that reflect the reasons for firings, demotions, reprimands, and transfers]," *id.* The Court then found that the disciplinary file summaries at issue in the case were nevertheless subject to disclosure because they did not contain " 'vast amounts of personal data' ", did not have access to them drastically limited, and were in fact frequently widely disseminated among the cadets. *Id.* at 377.

What the court below did was to engage in a similar kind of analysis. It ascertained, rightly, that the citizen-

[6] *See, e.g., Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 371, 373, 374 n. 11, 377.

ship and naturalization information requested did not qualify as "personnel and medical files" or as "similar files" because "citizenship is not an intimate personal detail" analogous to personnel decisions and medical facts. Petition at 2a. The court relied upon another District of Columbia Circuit decision, *Simpson* v. *Vance*, 648 F.2d 10, 13 (1980), in which it ruled that:

> "An examination of the legislative history of the Exemption shows that Congress used the terms 'personal and medical files' as examples of records incorporating the type of information—'intimate details' about an individual—which deserves protection. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11, *reprinted in* [1966] U.S. Code Cong. & Admin. News, pp. 2418, 2428. Because the common denominator to both personnel and medical records is the personal quality of the information contained therein, this court, in fashioning the test for determining whether information is 'similar' to personnel and medical files under the Act, . . . [has required] that the data must be 'of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records.' . . . If the personal nature of the information meets this test, then the records which contain such information will fall into the category of 'similar files' within the meaning of Exemption 6."

The test[7] is perfectly consistent with *Department of*

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[7] The *Simpson* court's "intimate details" formulation derives from the 1966 House Report on the Act:

> "Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing *intimate details* about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority. A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record."

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (emphasis added).

the Air Force v. *Rose*, for it is only after "similar files" kind of information has been identified that a court can proceed to the balancing test outlined in *Rose*.

The "conflict" among the Circuits which the Government purports to remark is in fact virtually nonexistent as is apparent from the various decisions the Government itself quotes in its petition. The court below used a definition of "similar files" that is not substantively different from the allegedly conflicting formulations of the Third, Fifth, and Sixth Circuits: "to qualify as 'similar' files, the recorded data must incorporate 'intimate details' about an individual, information '"of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records."'" Petition at 2a-3a. The Third Circuit has ruled that "[t]he common denominator in 'personnel and medical and similar files' is the personal quality of information in the file, the disclosure of which may constitute a clearly unwarranted invasion of personal privacy." *Wine Hobby USA, Inc.* v. *Internal Revenue Service*, 502 F.2d 133, 135 (1974). The Fifth Circuit has declared that "the determining factor in deciding whether information contained in government files is protected from disclosure [by the "similar files" portion of (b)(6)] hinges on the personal nature of that information." *Pacific Molasses Co.* v. *National Labor Relations Board*, 577 F.2d 1172, 1181 (1978). And the Sixth Circuit has held that "we take the words ['similar files'] to mean that the records in question must, like medical and personnel files, contain information of a personal or confidential nature." *Madeira Nursing Center, Inc.* v. *National Labor Relations Board*, 615 F.2d 728, 730 (1980). Although these cases address different factual claims, the legal test applied is quite similar throughout (and patterned on the test enunciated by this Court in *Department of the Air Force* v. *Rose*): to be covered by the "similar files" exemption of (b)(6), the informa-

tion must be akin to that in personnel and medical files in that it is of a "personal," "confidential," or "intimate" character, and there must be some reasonable expectation of privacy. None of these courts, it should be noted, has ever held citizenship or naturalization information to be covered by Exemption (b)(6), whatever verbal formulation the courts chose to define "similar files." [8]

It may be that review by this Court of some case is warranted because an important question under Exemption (b)(6) is presented by the possible disclosure of "personal" information, since, as the Government notes, "[f]ederal agencies of necessity accumulate records containing personal data on virtually every American." Petition at 26. This is not such a case.[9] What is at stake

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[8] The Government argues for the following test: "[F]irst, that the information is personal, second that release of the information would constitute an invasion of privacy, and third, that any such invasion would be clearly unwarranted in view of the public interest in disclosure." Petition at 27 n.14. Clearly, all three prongs of this proposed test would have to be satisfied before the exemption applies.

Even under the proposed test, however, the information sought in this case would clearly *not* fall within Exemption (b)(6). Indeed, the test proposed by the Government is not substantially different from the test applied by the courts below. The district court applied a virtually identical three-pronged test and concluded that because "the information sought is a matter of public record" and "the public would best be served by disclosure of the information" . . . , "[d]efendants have not met their burden of proof under the three-pronged test cited above. . ." Petition at 12a-13a.

The court of appeals similarly concluded that the information was not sufficiently private to qualify for Exemption (b)(6). Even under the Government's proposed test, no balancing is necessary when there is not a privacy interest sufficient to serve as a counter weight to the public interest in disclosure.

[9] There are here, for example, no questions relating to disclosure of an individual's financial situation, his medical condition or history, opinions from his employer concerning job reliability,

here is not the revelation of personal or intimate data, concerning which there might be a legitimate privacy expectation and interest. What is at issue here is tantamount to public court records which do not happen to be in respondent's possession. A decision in this case could not, therefore, give guidance to the courts below as they wrestle with disclosure requests for truly "personal" information concerning individuals on file with, *e.g.*, the Veterans Administration, the Department of Health and Human Services, the Bureau of Prisons, or the Selective Service.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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reprimands or letters of criticism from an employer, transcripts or grade records, or conclusions from an employer concerning the person's intelligence, competence, and qualifications.

Petitioner's Reply Brief

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Office - Supreme Court, U.S.
FILED
OCT 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-535

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES DEPARTMENT OF STATE, ET AL., PETITIONERS

v.

THE WASHINGTON POST COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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1. In our petition for a writ of certiorari, we contended that the court of appeals erred in holding that "Department of State records that would indicate whether two individuals now residing in Iran are U.S. citizens or hold U.S. passports" (Pet. App. 2a) are not "similar files" within the meaning of Exemption 6 of the Freedom of Information Act, 5 U.S.C. 552(b)(6). That holding was based on the notion, contrary to congressional intent and to decisions of this Court and of other courts of appeals, that "similar files" are limited to files incorporating details that are generically highly intimate. As we explained, the consequence of applying this threshold test to Exemption 6 claims is to preclude agencies and courts from balancing the harm to an individual caused by the invasion of his personal privacy against the public interest in disclosure, in order to determine whether the invasion would be clearly unwarranted.

The principal response offered in respondent Washington Post's brief in opposition (Br. in Opp. i, 2-4, 11) is that, even under a less strict threshold test than that applied in the District of Columbia Circuit, records containing matters "encompassing * * * public judicial proceedings" or other "public" facts can never qualify for Exemption 6 treatment, no matter what the harm to an individual from disclosure in a particular case. This contention is at variance even with the law of the District of Columbia Circuit, which properly considers "marital status" a matter that survives the threshold test, even though marriage and divorce are events that are as publicly sworn, declared, and recorded as naturalization. See *Simpson* v. *Vance*, 648 F. 2d 10, 17 (D.C. Cir. 1980). Although, in the vast majority of cases, disclosure of information about marital status, naturalization status, or the possession of a currently valid United States passport would constitute information about persons that should be disclosed under the Exemption 6 balancing test, there are occasional instances in which the balance would properly be struck against disclosure. There is, accordingly, no basis for respondent's assertion that Congress intended these vast categories of information to be disclosed without any consideration of the harm that might result.

We do not dispute the proposition that matters which are publicly declared in open court are subject to diminished privacy expectations. However, any such diminution of the privacy expectations of Dr. Ibrahim Yazdi and Dr. Ali Behzadnia is a factor that the court of appeals should have considered in balancing the serious harm that could result

from disclosure[1] against the public interest in that disclosure—not a factor that should bar Exemption 6 scrutiny altogether.[2]

2. Our argument in no way challenges the right of the press to publish court records. Respondent's invocation (Br. in Opp. 4-5) of "gag" and "censorship" cases thus merely serves to focus attention on questions not at issue here. In fact, what respondent seeks in this lawsuit are not copies of court records but copies of State Department documents that may or may not include naturalization records or

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[1]The potential danger to these individuals or others is a matter of *unrebutted* fact established in affidavits of former Assistant Secretary of State Saunders, who had dealt with Iran-related matters since 1961 as a member of the staff of the National Security Council. Respondent submitted no testimony to the contrary. Absent rebuttal evidence or agency bad faith, the District of Columbia Circuit gives such affidavits substantial weight. See, *e.g.*, *Halperin* v. *CIA*, 629 F. 2d 144, 148 (D.C. Cir. 1980). Hence, the decision of the court below clearly does not reflect any discounting of the gravity of the consequences of the disclosure here. With respect to the *argument* of *respondent's counsel* (Br. in Opp. 4, n.4) concerning the prelitigation *Washington Post* article about Yazdi, Saunders' affidavit established that harm could occur, "regardless of whatever information concerning the citizenship status of the individuals may currently be in the public domain" (C.A. App. 20; and see Point 2, *infra*).

[2]The issue here, it bears repeating, is not whether the documents respondent has requested may be withheld but merely whether the court of appeals, in assessing the government's Exemption 6 claim, is obliged to consider the magnitude of the invasion of personal privacy that would result from disclosure. Respondent's discussion of so-called "public" facts that "must be disclosed regularly in all sorts of public and private transactions" (Br. in Opp. 2) obscures and confuses this crucial difference. For example, a person's height or weight are surely among the most "public" of facts. Yet, if an FOIA request for that information were denied, the government's refusal to disclose the data would unquestionably be subject to the balancing test of Exemption 6.

records regarding the institution of administrative procedures to expatriate individuals. See 8 U.S.C. 1481(a).[3] In essence, respondent seeks State Department confirmation or denial of reported allegations denied by Yazdi (see Pet. 4) and of speculations regarding Behzadnia. But as the affidavits of Assistant Secretary Saunders explained (see Pet. 3-4), *either* confirmation *or* denial could cause harm to individuals—either to the two men concerned here or to the subjects of future requests. The State Department's perception of a danger to individuals even through a response that effectively denies allegations reported elsewhere is hardly irrational. "It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that is is so; it is quite another thing for one in a position to know of it officially to say that it is so." *Kropf* v. *Colby*, 509 F. 2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975). As the Seventh Circuit has recently remarked in an FOIA case, "official confirmation of public speculation may lead other governments to take some action that otherwise would not be taken had there been no confirmation." *Stein* v. *Department of Justice*, No. 79-1615 (Oct. 19, 1981). See also *Phillippi* v. *CIA* 655 F. 2d 1325, 1330-1331 (D.C. Cir. 1981).

3. Respondent's contention (Br. in Opp. 9-10) that the conflict in the circuits discussed in the petition (Pet. 20-26) is "virtually nonexistent" appears to be grounded on two premises: first, that "personal" information is the equivalent of "highly personal" information involving "intimate details" and, second, that information placed in the public

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[3]Expatriation proceedings are typically initiated in United States consulates abroad and are not the equivalent of public judicial proceedings. Respondent's request for documents revealing the present citizenship status of Yazdi and Behzadnia would necessarily encompass such expatriation records if either man had been naturalized and subsequently lost his citizenship for any of the reasons set forth in 8 U.S.C. 1481(a).

record can never be "personal." Both premises obviously are false. In any event, as we demonstrated in the petition, other circuits have declined to give a narrow construction to the statutory term "similar files" so as not to "preclude inquiry into [the] more crucial question" whether disclosure in the particular case "would result in a clearly unwarranted invasion of personal privacy." *Wine Hobby USA, Inc.* v. *IRS*, 502 F. 2d 133, 135 (3d Cir. 1974). We submit that, like Judge Lumbard in his concurring opinion, those courts would not conclude that citizenship or naturalization information is so lacking in personal significance that it necessarily fails to qualify for Exemption 6 protection in every case.

For the foregoing reasons, and for the additional reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

OCTOBER 1981

DOJ-1981-10

Petitioner's Brief

FILED
JAN 8 1982
ALEXANDER L. STEVAS,

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BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether State Department records that would reveal whether two Iranian nationals are naturalized American citizens holding valid United States passports are "similar files" within the meaning of Exemption 6 of the Freedom of Information Act and are thus eligible for withholding on the ground that public disclosure would constitute a clearly unwarranted invasion of personal privacy.

PARTIES TO THE PROCEEDING

Other parties, in addition to those named in the caption, are Alexander M. Haig, Jr., Secretary of State, and Frank M. Machak, Information and Privacy Coordinator for the Department of State.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 647 F.2d 197. The orders of the district court (Pet. App. 12a-14a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1981 (Pet. App. 6a-7a). A petition

for rehearing was denied on May 19, 1981 (Pet. App. 8a-11a). On August 10, 1981, Justice Brennan extended the time in which to file a petition for a writ of certiorari to September 16, 1981. The petition was filed on September 15, 1981, and was granted on November 9, 1981 (J.A. 43). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Subsection (a)(4)(B) of the Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

2. Subsection (b)(6) of the Freedom of Information Act, 5 U.S.C. 552(b)(6), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy * * *.

STATEMENT

1. On September 11, 1979, Christopher M. Little, Vice President and Counsel for respondent, the Washington Post Company, filed a formal request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking from the Department of State "documents indicating whether Dr. Ali Behzadnia and Dr. Ibrahim Yazdi," two Iranian nationals living in Iran, "hold valid U.S. Passports" (J.A. 8). He added that he would "accept any record held by the Passport Office indicating whether either of these persons is an American citizen" (*ibid.*).

On October 11, 1979, the State Department denied this request on the ground that the information requested came within Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6), protecting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (J.A. 14). On December 12, 1979, following respondent's administrative appeal to the Department's Council on Classification Policy (J.A. 19-20), an Appeals Review Panel affirmed the denial of the request, stating that "the privacy interests to be protected are not incidental ones, but rather are such that they clearly outweigh any public interests which might be served by release of the requested information" (J.A. 22-23).

2. While pursuing its administrative appeal, respondent commenced the present action to enjoin the Department and two named officials from withhold-

ing the requested records. The action was filed in the United States District Court for the District of Columbia on October 9, 1979, after the statutory period for exhaustion of administrative remedies had expired (J.A. 4-7). On January 17, 1980, the government moved for summary judgment. In support of this motion, it filed an affidavit dated January 14, 1980, by Assistant Secretary of State Harold H. Saunders, who was then Director of the Iran Working Group (J.A. 16-18). Assistant Secretary Saunders stated (J.A. 17) that one of the individuals named by respondent, Dr. Yazdi, had left his position as Iranian Foreign Minister shortly after the takeover of the American Embassy in Tehran, but remained in Iran as a member of the Iranian Revolutionary Council. The other named individual, Dr. Behzadnia, had been a senior officer in the Iranian Ministry of National Guidance, and while his current official position was unknown, he also was believed still to be residing in Iran (*ibid.*). Saunders further stated that, given the current social and political conditions in Iran (which he briefly described), any confirmation or denial by the State Department that either individual possesses a United States passport or is a United States citizen "is likely to cause a real threat of physical harm to that person" (*ibid.*). Saunders explained that, even assuming there was no passport file on either of these individuals, the Department could not announce that fact without endangering the subjects of future requests for such information. As he noted (J.A. 17):

> If there were no passport files relating to these individuals and if the Department of State were to indicate this, our refusal in the future to dis-

> close whether or not a passport file exists on the basis of the (b)(6) exemption in a similar Freedom of Information Act case would be tantamount to an admission that such a file existed.

Respondent filed a cross-motion for summary judgment in which it argued that naturalization and denaturalization actions are matters of public record, filed with the appropriate courts. Respondent also cited a pre-litigation article it had published (J.A. 35-38), which asserted that one of the individuals (Dr. Yazdi) had become a naturalized American citizen in 1971 and that he had not yet renounced his United States citizenship. The article stated (J.A. 38) that the source of this information was the United States Immigration and Naturalization Service (INS). The article also reported that Dr. Yazdi was "apparently sensitive" about his previous American residency and "flatly denied reports that he is an American citizen" (J.A. 37).

In a brief order, the district court held that the government had not met its burden under Exemption 6 because "the information sought is a matter of public record [and] the public would best be served by disclosure of the information" (Pet. App. 12a-13a). The State Department then moved for reconsideration and submitted a supplemental affidavit by Assistant Secretary Saunders (J.A. 40-41). This affidavit, dated April 22, 1980, explained (J.A. 41):

> 2. Since my affidavit on January 14, Dr. Yazdi has been elected to the National Assembly which is the Iranian parliament. We have had no information about Dr. Behzadnia's activities in months.

> 3. There continues to be intense anti-American sentiment in Iran and several revolutionary leaders have been strongly criticized in the press for their alleged ties to the United States. Any person suspected of having such a connection would likely be subject to severe scrutiny, suspicion and possible harm.

Saunders also noted that recent experience had provided several examples of the risk to Iranians whose names are linked to the United States in official documents and, in an in camera submission to the court (J.A. 42), he mentioned four such examples. On May 16, 1980, the district court denied the motion for reconsideration without opinion (Pet. App. 14a).

3. In the court of appeals, the government challenged the district court's decision on the ground that the documents sought by respondent constituted "similar files" within the meaning of Exemption 6 because, assuming the documents existed, they would contain personal information pertaining to the named individuals' citizenship status. The government also contended that a balancing of the public and private interests involved compelled the conclusion that disclosure of the requested information—which could pose a threat to the physical safety of the named individuals—would constitute "a clearly unwarranted invasion of personal privacy."

The court of appeals professed itself "sympathetic to the Department's reluctance to release these records," particularly in light of the affidavit stating that such a release is likely to "endanger the lives of the two individuals since they have returned to Iran" (Pet. App. 3a-4a), but it affirmed the district court's disclosure order (*id.* at 4a). The court of appeals

held (*id.* at 2a) that the government had failed to satisfy the requirement of Exemption 6 that "the information is contained in 'personnel and medical files' or 'similar files.'" Relying upon two previous D.C. Circuit decisions, *Board of Trade* v. *CFTC*, 627 F.2d 392, 398 (1980), and *Simpson* v. *Vance*, 648 F.2d 10, 13 (1980), the court stated (Pet. App. 2a-3a) that "to qualify as 'similar' files, the recorded data must incorporate 'intimate details' about an individual, information "'of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records.'"

Concluding that "the facts of current citizenship or possession of a United States passport are no more personal than the dates of naturalization held non-exempt in *Simpson*," the court of appeals declared that, "[w]ithout overturning *Simpson* and our earlier expressions consistent with it, we cannot rule that the information sought here is contained in files 'similar' to 'personnel and medical files'" (Pet. App. 3a). Because the court held that the files in question do not qualify under "the first facet of the Exemption 6 test," it ordered disclosure without reaching "the issue of balancing interests in disclosure against privacy concerns" (*id.* at 4a). "The Department's concern is clear," the court acknowledged, "but it is not within our province to recast Exemption 6 or this court's precedent to accommodate that concern" (*ibid.*).

Judge Lumbard, sitting by designation, concurred only because he believed that "*Simpson* states the law of this Circuit on the issue" (Pet. App. 5a). He added, however (*ibid.*):

> Were the issue one of the first impression in this Circuit, I would vote to hold that citizenship or naturalization information is protected from disclosure by Exemption 6 of the Freedom of Information Act. 5 U.S.C. § 552(b)(6). * * * I think it quite possible that the *Simpson* panel failed to envision situations such as the one before us now, in which revelation of American citizenship information relating to officials of foreign governments would be extremely embarrassing to the individuals involved. The facts of the case before us dramatically demonstrate that citizenship and naturalization information is often of a highly personal and potentially embarrassing nature. I also note that while such information is a matter of public record on file in various federal district courts across the country, the information is difficult to locate, and the same appears to be true of the marital and family information which was held excludable in *Simpson*.

The court of appeals subsequently denied the government's petition for rehearing and suggestion for rehearing en banc by a 6-4 vote (Pet. App. 10a-11a).

SUMMARY OF ARGUMENT

The Freedom of Information Act "establish[es] a general philosophy of full agency disclosure * * *." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). At the same time, the Act recognizes that "[i]t is also necessary for the very operation of our Government to allow it to keep confidential certain material * * *" (*ibid.*). To accommodate these competing interests, the FOIA makes available "to any person" all "identifiable" agency records (5 U.S.C. 552(a)) but then

defines nine categories of information, the disclosure of which would damage legitimate government or private concerns, to which the Act "does not apply." 5 U.S.C. 552(b). Exemption 6 provides that the FOIA "does not apply" to, and hence that agencies may withhold from the public, "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

In this case, the court of appeals has held that in order to constitute a "similar file" within Exemption 6, the requested material must consist of "intimate details" about an individual, and that unless that threshold requirement is met, a district court is prohibited from examining the records in question to determine whether the public interest in disclosure outweighs the invasion of personal privacy that would result from such action. In applying this highly restrictive interpretation of the phrase "similar files," the court below concluded that the FOIA required public disclosure of Department of State records showing whether two named Iranian nationals living in Iran are naturalized American citizens holding valid United States passports—despite the existence of unrebutted affidavits asserting that any such disclosure would be likely to endanger the safety of the two individuals involved. Because passport or naturalization records, in the court's view, are not *generically* intimate, the court refused to "reach the issue of balancing interests in disclosure against privacy concerns" (Pet. App. 4a).

In interpreting Exemption 6 in this fashion, the court of appeals unquestionably erred. The language of the exemption does not contain an "intimate de-

tails" test, and the legislative history clearly indicates that the purpose of Exemption 6 was to strike a balance between the public's right to know and an individual's right to privacy "by excluding [from disclosure] those kinds of files *the disclosure of which might harm the individual.*" H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (emphasis added). Congress' inclusion of the phrase "similar files" in Exemption 6 was based on the recognition that it would be highly impractical to identify every kind of government record to which the exemption should apply. S. Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964). To keep the reach of the exemption within bounds, however, Congress added the qualifying phrase "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The House and Senate reports explicitly state that this phrase was to be the primary determinant of the exemption's applicability. S. Rep. No. 813, *supra*, at 9; H.R. Rep. No. 1497, *supra*, at 11.

The court of appeals' interpretation of "similar files" would lead to anomalous results. Information that is part of a "personnel" or "medical" file may be considered for withholding under the Exemption 6 balancing test regardless of whether it is generically intimate, *i.e.*, whether it would be regarded as highly personal with respect to most persons under most circumstances. However, information that the government has assembled about individuals in *other* files—even information identical to that which may be present in a personnel or medical file—is not eligible for consideration under the balancing test and may not be withheld despite a showing that, in the circumstances of a particular

case, its disclosure would constitute a clearly unwarranted invasion of personal privacy. Congress surely did not intend that the application of Exemption 6 to disclosures of personal information should turn on the type of government file in which the information is contained, and it surely did not intend that *any* personal information in government files would be subject to mandatory disclosure without consideration of the competing public and private interests in disclosure.

The present case illustrates the point well: naturalizations are a matter of court record, and most United States citizens, naturalized or otherwise, would not regard citizenship as an "intimate" fact the disclosure of which could be embarrassing or otherwise harmful. For residents of Iran, however, possession of such citizenship in the current political climate might be indicative of personal political or philosophical views, and disclosure of that fact would be not only embarrassing but dangerous. However a court or agency might strike the appropriate balance in a particular case, it is wholly inconsistent with Congress' purpose to require public release of such information without engaging in the balancing process.

The holding below is also at odds with this Court's decision in *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976). In *Rose*, the Court recognized that the principal criterion for determining the applicability of Exemption 6 is whether disclosure of the requested information will result in a "clearly unwarranted invasion of personal privacy." Nothing in that case indicates that the phrase "similar files" covers only personal information that is uniformly embarrassing or generically intimate. Rather, the

Court noted (*id.* at 375 n.14) that the sparseness of the legislative history surrounding the term "personnel files" suggested that Congress did not intend the threshold "files" characterization to be "critical in the application of Exemption 6."

ARGUMENT

STATE DEPARTMENT RECORDS THAT WOULD REVEAL WHETHER TWO IRANIAN NATIONALS ARE NATURALIZED AMERICAN CITIZENS HOLDING VALID UNITED STATES PASSPORTS ARE "SIMILAR FILES" WITHIN THE MEANING OF EXEMPTION 6 OF THE FREEDOM OF INFORMATION ACT AND ARE THUS ELIGIBLE FOR WITHHOLDING ON THE GROUND THAT PUBLIC DISCLOSURE WOULD CONSTITUTE A CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

The Freedom of Information Act embodies both a basic policy of government disclosure and a policy of ensuring that mandatory disclosure requirements do not unnecessarily harm either legitimate government interests or legitimate interests of private individuals. Thus, as the Court has recognized, the FOIA "seeks to permit access to official information long shielded unnecessarily from public view," but the exemptions enumerated in the Act "[are] part of this scheme and represent[] the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). See also *Administrator, FAA* v. *Robertson*, 422 U.S. 255, 262 (1975).

Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6), which removes from the Act's mandatory disclosure requirement "personnel and medical files and similar

files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," is a part of that congressional scheme to which, we submit, the court of appeals failed to give effect in this case. The court below held that unless requested personal information about an individual is in a personnel or medical file, or consists of what would generally be regarded as "intimate details," the information may not even be scrutinized by a district court under Exemption 6 to determine if its disclosure would, in light of existing circumstances, constitute a clearly unwarranted invasion of the individual's personal privacy. For that reason, the court of appeals ordered release of the sensitive records at issue here without any consideration of whether the public interest in the requested information concerning Dr. Yazdi and Dr. Behzadnia outweighed the invasion of their personal privacy that might result from disclosure (Pet. App. 4a). As we show below, the court's holding is based on an erroneous reading of Exemption 6's language and legislative history that frustrates its underlying purpose and that is inconsistent with this Court's previous analysis of the exemption.

A. The Court of Appeals' "Intimate Details" Test is Not Supported by the Language or the Legislative History of Exemption 6

1. The decision of the court of appeals turns on its construction of two words in Exemption 6—"similar files." That phrase is limited, the court concluded, to files that "incorporate 'intimate details' about an individual, information ' "of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records" ' " (Pet.

App. 2a-3a, quoting *Board of Trade* v. *CFTC*, 627 F.2d 392, 398 (D.C. Cir. 1980)).[1] The court of ap-

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[1] In *Board of Trade*, the District of Columbia Circuit held that Exemption 6 did not extend any protection to the identities of "trade sources" who had supplied the Commodity Futures Trading Commission with information pertaining to plaintiff's plywood futures contract. The court of appeals' decision was premised, in part, on its conclusion that the data did not qualify as "similar files" because they dealt with business matters, rather than with some aspect of the informants' personal lives (*i.e.*, "no fact of an intimate nature is likely to be revealed"). 627 F.2d at 399-400. In a subsequent decision, the court of appeals ruled that Exemption 6 was designed to protect only "intimate details of personal and family life, not business judgments and relationships." *Sims* v. *CIA*, 642 F.2d 562, 575 (1980).

Finally, in *Simpson* v. *Vance*, *supra*, a decision that the panel considered dispositive of the instant case, the D.C. Circuit further narrowed the class of information protected by Exemption 6. *Simpson* involved an FOIA request for the State Department's "Biographic Register," a compilation of personal data on certain high and mid-level government employees in the field of foreign relations, describing their educational backgrounds, employment experience, and other essential biographical facts (including naturalization data, where applicable). The court of appeals held that, with the exception of marital status data, the information at issue had to be disclosed because, "[a]lthough * * * the information which the Department is withholding relates to the employees' private lives, and therefore some privacy interest is present, that interest is not of the 'magnitude' such as those warranting protection in personnel and medical files." 648 F.2d at 14, quoting *Board of Trade* v. *CFTC*, *supra*, 627 F.2d at 398. Applying an "intimate details" standard, the court concluded that the information was not a "similar file" within the meaning of Exemption 6 and therefore was not entitled to protection, without regard to the outcome of the balancing test in any particular case. *Ibid.*

peals' "intimate details" test, however, is not dictated by the plain language of Exemption 6, and the exemption's legislative history suggests that Congress intended the phrase "similar files" to include a far wider range of documents. Such comprehensive coverage with respect to documents *eligible* for consideration under Exemption 6 does not threaten the basic disclosure purpose of the statute, because even "similar files" may not be withheld except where disclosure would pose a serious and clearly unwarranted threat to the personal privacy interests Congress sought to protect in that exemption.

A provision resembling Exemption 6 was included in bills introduced as long ago as 1957 to expand the public's access to government information by amending the public information section of the Administrative Procedure Act. See Subsection (f)(3) of S. 2148, 85th Cong., 1st Sess., 103 Cong. Rec. 7492 (1957). A privacy provision was omitted, however, in the original version of S. 1666, the principal bill considered in the 1963 hearings on "Freedom of Information" legislative proposals. S. 1666, 88th Cong., 1st Sess. (1963), *reprinted in Freedom of Information: Hearings on S. 1666 and S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 1-2 (1963).[2] The omission was soon cor-

[2] Subsection (f)(3) of S. 2148 exempted "subject matter * * * of such a nature that disclosure would be a clearly unwarranted invasion of personal privacy." 103 Cong. Rec. 7492 (1957). Congress' concern for personal privacy is indicated by the fact that, as one commentator has observed, "[t]he privacy exemption is one of the few to appear in almost every subsequent version of the act." Kronman, *The Privacy Exemption to the Freedom of Information Act*, IX(4) J. Legal Studies 727, 738 n.39 (Dec. 1980).

rected because the hearings on the bill made it clear to the Senate that many government agencies accumulate confidential medical data and other types of personal information on individuals and that such information may be entitled to protection from mandatory public disclosure.[3]

The bill as amended in committee and reported to the Senate thus contained a separate exemption for "personnel files, medical files, and similar matter the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." S. Rep. No. 1219, 88th Cong., 2d Sess. 17 (1964). The Senate Report on the bill explained (*id.* at 7) that it listed "personnel and medical files" in "an effort to indicate the types of records which should not be generally available to the public." In addition, the bill included a reference to "similar" files, in recognition of the fact that it would be "impossible to name" every type of record to which the exemption should apply. *Ibid.*[4]

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[3] The problem was pointed out at those hearings by Assistant Attorney General Norbert A. Schlei (*Hearings on S.1666 and S.1663, supra,* at 199):

> The range and volume of personal information in agency files, the countless channels by which it comes into the Government's possession, the extreme variety of needs for nondisclosure, and the infinite number of possibilities of injury to innocent individuals, indeed to any one of us, by its publication are beyond conjecture and certainly defy simple solution. Only a most thoroughgoing study of the extent of such information, its nature and location, and the legitimate needs for disclosure will provide satisfactory provisions to govern records containing private personal information.

[4] This explanatory section of the Senate Report refers (S. Rep. No. 1219, *supra,* at 7) to "similar records," although

Hence, from its inception, Exemption 6 was viewed by Congress as designed to cover a wide range of files containing personal information pertaining to individuals. To keep the scope of the exemption within limits, however, Congress added the qualifying phrase "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." As the second Senate Report explained (S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added)):

> Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc., have great quantities of files, the confidentiality of which has been maintained by agency rule but without statutory authority. There is a consensus that these files should not be opened to the public, and the committee decided upon a general exemption rather than a number of specific statutory authorizations for various agencies. *It is believed that the scope of the exemption is held within bounds*

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the text of amended S. 1666 as printed in that same report refers (*id.* at 17) to "similar matter." Both versions differ from the bill ultimately enacted, which used the term "similar files." See S. 1160, 89th Cong., 1st Sess. (1965), described in S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). While we have found nothing in the legislative history to indicate that this change was intended to have any substantive effect, Professor Davis has suggested that the modification means simply that none of the three categories of records is to be considered exempt in its entirety. Instead, the balancing test is to be applied to each segment of information in any given file. K. Davis, *Administrative Law Treatise* ¶ 3A.22 n.94 (Supp. 1970). See *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976) (discussed at pages 21-24, *infra*).

> *by the use of the limitation of "a clearly unwarranted invasion of personal privacy."*
>
> The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.[5]

The House Report (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (emphasis added; footnote omitted)) echoed this view:

> Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority. A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record. *The limitation of a "clearly unwarranted invasion of personal privacy" provides a balance between*

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[5] The first Senate Report contained almost identical language. S. Rep. No. 1219, *supra*, at 7, 14.

> *the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual.* The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records.

The legislative history of Exemption 6 thus establishes that Congress added the phrase "and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" because it recognized the impracticality of trying to identify all types of government information on individuals that might merit protection on personal privacy grounds. Read in this light, the term "similar files" was clearly intended to function simply as a generic descriptive device that would refer to the countless varieties of government records containing personal information having the potential for harm or embarrassment in particular cases.[6] At the

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[6] This explains the references in both H.R. Rep. No. 1497, *supra*, at 11, and S. Rep. No. 813, *supra*, at 9, to Exemption 6 as a "'*general*' exemption." *Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 373 n.10 (emphasis added). Cf. *Federal Public Records Law: Hearings on H.R. 5012, et al. Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 265, 267 (1965) (analysis of agency comments on S. 1666).

This interpretation of the threshold "similar files" test under Exemption 6 is also set forth in the *Attorney General's Memorandum on the Public Information Section of the*

same time, however, Congress was aware that not all information about individuals should be kept confidential, particularly when such information related to a matter of public concern. Accordingly, Congress provided that the exemption would be applicable only when the government could demonstrate that disclosure would result in "a clearly unwarranted invasion of personal privacy."

The meaning of "similar files" that emerges from an analysis of the legislative history does not, it should be noted, amount to a threshold test without substance—*i.e.*, a test that fails to screen out any category of information that would not, in any event, necessarily be eliminated by the balancing test. One can easily hypothesize information about corporations, for example, the disclosure of which could be highly embarrassing and damaging to individuals; but information that pertains *only* to such business entities and that identifies no particular individual is not "personal" information, whatever the consequences of its disclosure might be to individual per-

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Administrative Procedure Act (June 1967), which states (at 36; emphasis added) that "the exemption is intended to exclude from the disclosure requirements all personnel and medical files, and *all private or personal information contained in other files* which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person * * *." And in explaining the 1974 amendment to Exemption 7(C), the *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* (Feb. 1975) states (at 9-10; emphasis added) that Exemption 6 protects "information about an individual which he could reasonably assert an option to withhold from the public at large because of its intimacy *or its possible adverse effects upon himself or his family.*"

sons.[7] In sum, Congress sought, through Exemption 6, to permit the government to avoid inflicting unnecessary injury or embarrassment on individuals through the disclosure of information it had assembled in its files identifying them by name or other particularizing characteristics, at least where the public interest in disclosure does not outweigh the harm to the individuals concerned.

B. The Court of Appeals' Holding Is Inconsistent With This Court's Prior Construction of Exemption 6 and With Well Reasoned Decisions of Other Courts of Appeals

In *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976), this Court for the first time considered the scope of Exemption 6 of the FOIA. The Court's thorough discussion in *Rose* of the evidence of congressional intent with respect to the operation of Exemption 6 leaves little doubt that the court of appeals erred in applying an "intimate details" test for determining what are "similar files" within the meaning of the exemption.

1. *Rose* involved an FOIA request for case summaries (with personal references deleted) of honor and ethics hearings conducted at the United States

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[7] Disclosure of financial records of a large corporation might, for example, prove embarrassing to the corporation's officers or board of directors, since such records might reveal gross inefficiency or mismanagement of the corporation. But that financial information would not, simply by virtue of the damaging impact, become "personal" information that meets the threshold test of Exemption 6. By contrast, information about a sole proprietorship or information in corporate records held by the government that relates to a particular individual or individuals might well qualify for Exemption 6 consideration.

Air Force Academy. In opposing disclosure, the government contended, *inter alia*, that the summaries were "personnel files" and that Exemption 6 provided a blanket protection for all material in personnel files, regardless of whether its disclosure would constitute a "clearly unwarranted invasion of personal privacy." 425 U.S. at 370-371. The government construed the latter, "balancing" part of the exemption as relevant *only* to "similar files" *i.e.*, those files other than personnel or medical files to which the exemption extended. *Ibid.* The Court rejected both the government's construction of Exemption 6 and the contention that the case summaries constituted "personnel files" (*id.* at 371-376), but it did find that the summaries constituted "similar files," portions of which could be withheld on a showing that their disclosure would constitute a "clearly unwarranted invasion of personal privacy." *Id.* at 376-382.

In rejecting the government's interpretation of Exemption 6, the Court emphasized that Congress had "enunciated a single policy, to be enforced * * * [with respect to both "personnel files" and "similar files"] by the courts, [a policy] 'that will involve a balancing' of the private and public interests." 425 U.S. at 373 (footnote omitted). In this connection, the Court noted (425 U.S. at 373 n. 10) that both the House Report and the Senate Report (H.R. Rep. No. 1497, *supra*, at 11; S. Rep. No. 813, *supra*, at 9) referred to Exemption 6 as "'[a] *general* exemption'" limited in scope by the requirement that the government show that disclosure would result in "'a clearly unwarranted invasion of personal privacy.'"

In concluding that the documents sought in *Rose* were "similar files," as opposed to personnel files, the Court focused primarily on the fact that their disclosure would implicate privacy values similar to those implicated in personnel files: specifically, that " 'identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends.' " 425 U.S at 376-377, quoting *Rose* v. *Department of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974). Earlier in its opinion, however, the Court had made clear that it agreed with the courts below that " '[i]t is only *the identifying connection to the individual* that casts the personnel, medical, and similar files within the protection of [the] sixth exemption' " and that " 'the key words, of course, are "a clearly unwarranted invasion of personal privacy" ' " (425 U.S. at 371; emphasis added).

In light of these comments, *Rose* cannot be read as suggesting that only personal information of a type that would be likely to cause disgrace or embarrassment in virtually every case could qualify as "similar files." To the contrary, the Court emphasized that the balancing test is the crucial factor in Exemption 6 determinations. This approach is further confirmed by the Court's observation regarding the legislative history bearing on the term "personnel files" (425 U.S. at 375 n.14; emphasis added):

> There is sparse legislative history as to the precise scope intended for the term "personnel files," *a detail which itself suggests that Congress intended that particular characterization not to*

> *be critical* in the application of Exemption 6. But it is quite clear from the committee reports that the *primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters* in such files as those maintained by the Department of Health, Education, and Welfare, the Selective Service, and the Veterans' Administration.

Thus, throughout its opinion in *Rose*, the Court indicated its understanding that Congress intended the phrase "clearly unwarranted invasion of personal privacy" to be the primary focus in determining whether Exemption 6 would apply. Contrary to comments in decisions of the District of Columbia Circuit,[8] nothing in *Rose* suggests that personal information, whose disclosure could result in the most drastic forms of invasions of personal privacy, would have to be disclosed to the public despite Exemption 6 because it failed to meet an additional threshold test such as the one imposed by the court below.

2. Even prior to this Court's decision in *Rose*, other courts of appeals had interpreted the "similar files" provision of Exemption 6 to encompass any information of a personal nature—*i.e.*, information directly pertaining to an individual—on the ground that to do otherwise would frustrate Congress' intent to make the balancing of private and public interests in disclosure the guiding principle of the exemption. Thus, in *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133 (1974), a case cited with approval several times in *Rose*, the Third Circuit held that a list of the names and addresses of persons registered with the Bureau of Alcohol, Tobacco and Firearms to produce wine

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[8] *See, e.g., Sims* v. *CIA*, 642 F.2d 562, 575 (1980).

for family use constituted a "similar file" within the meaning of Exemption 6. The court stated (*id.* at 135; footnote omitted):

> We believe that the list of names and addresses is a "file" within the meaning of Exemption (6). A broad interpretation of the statutory term to include names and addresses is necessary to avoid a denial of statutory protection in a case where release of requested materials would result in a clearly unwarranted invasion of personal privacy. Since the thrust of the exemption is to avoid unwarranted invasions of privacy, the term "files" should not be given an interpretation that would often preclude inquiry into this more crucial question.
>
> Furthermore, we believe the list of names and addresses is a file "similar" to the personnel and medical files specifically referred to in the exemption. The common denominator in "personnel and medical and similar files" is the personal quality of information in the file, the disclosure of which may constitute a clearly unwarranted invasion of personal privacy. We do not believe that the use of the term "similar" was intended to narrow the exemption from disclosure and permit the release of files which would otherwise be exempt because of the resultant invasion of privacy.

The *Wine Hobby* interpretation of "similar files" has been followed by other courts of appeals.[9] In

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[9] As we noted in the petition for certiorari (at 22 n.11), the Third Circuit recently issued a decision that appeared to cite with approval the court of appeals' decision in the instant case. *Ferri* v. *Bell*, 645 F.2d 1213, 1217 (1981). On October 23, 1981, however, the Third Circuit granted the government's petition for rehearing and vacated its earlier opinion in *Ferri*.

Pacific Molasses Co. v. *NLRB*, 577 F.2d 1172 (1978), the Fifth Circuit held that individual union authorization cards held by the National Labor Relations Board are "similar files" within the meaning of Exemption 6. So long as the information is of a "personal nature," the court reasoned (*id.* at 1181 & n.5), "the emphasis should be placed on whether disclosure of the information would result in a clearly unwarranted invasion of personal privacy." [10] Similarly, in *Madeira Nursing Center, Inc.* v. *NLRB*, 615 F.2d 728

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[10] In electing to follow the Third Circuit's approach in *Wine Hobby*, the Fifth Circuit expressly rejected an "intimate details" test it found in a pre-*Rose* Fourth Circuit case, *Robles* v. *EPA*, 484 F.2d 843 (1973). A later panel of the Fifth Circuit suggested, however, that *Robles* was in accord with *Pacific Molasses*. *Harbolt* v. *Department of State*, 616 F.2d 772, 774, cert. denied, 449 U.S. 856 (1980) (upholding nondisclosure of names and addresses of American citizens imprisoned in foreign countries on narcotics offenses).

For other decisions that seem to endorse (without substantial discussion) an "intimate details" test for Exemption 6's "similar files" requirement, see *Kurzon* v. *Department of Health & Human Services*, 649 F.2d 65 (1st Cir. 1981), and *Brown* v. *FBI*, 658 F.2d 71 (2d Cir. 1981). Those decisions, however, do not necessarily portend the same rigid application of a restrictive "similar files" test in those circuits that has typified recent D.C. Circuit decisions. In *Kurzon*, in which the First Circuit rejected an Exemption 6 claim for lists of the names and addresses of unsuccessful applicants for research grants from the National Cancer Institute, the court's resolution of the "similar files" issue appears to have been influenced in part by its determination that none of the grant applicants would suffer any appreciable harm as a result of the disclosure (and, hence, that disclosure would be warranted even if the balancing test were applied). 649 F.2d at 69-70. In *Brown*, the court merely cited the "intimate details" standard in the course of *upholding* an Exemption 6 claim for FBI files on a kidnaping victim who testified against the kidnaper. 658 F.2d at 75.

(1980), the Sixth Circuit adopted the *Wine Hobby* approach to construing "similar files," holding that the phrase requires only that "the records in question must, like medical and personnel files, contain information of a personal or confidential nature." *Id.* at 730.

C. The Court of Appeals' Construction of "Similar Files" Will Require Disclosure of Personal Information That Congress Intended to Protect and Will Produce Anomalous Results

The court of appeals' holding that information contained in government files that do not qualify as personnel or medical files must meet a highly restrictive "intimate details" test[11] is directly in conflict

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[11] The opinion of the court of appeals in this case, like the opinion in *Board of Trade* v. *CFTC*, *supra*, ambiguously applies the term "files" both to the information sought by the requester and to the documents or system of documents that contain it. Thus, in applying the "intimate details" test, the court below focused on "facts of current citizenship or possession of a United States passport" in its holding that "similar files" were not involved (Pet. App. 3a). Yet it initially stated (*id.* at 2a; emphasis added) that the threshold showing to be made by an agency invoking Exemption 6 is that "the information *is contained in* 'personnel and medical files' or 'similar files'." Similarly, the court in *Board of Trade* first described the test as "whether the desired information *is contained in* documents that are 'similar files' within the purview of * * * [E]xemption [6]" (627 F.2d at 396; emphasis added), but later characterized the test as "whether information to which access is denied under the aegis of Exemption 6 is 'similar' to personnel or medical files" (*id.* at 397).

In our view, a focus on the nature of the information requested is more in keeping with the congressional intent to prevent harm to individuals from the release of information about them that is contained in government files. Even if the focus is properly on the character of the documents or record

with the approach outlined in the legislative history of Exemption 6. That history, as explained above (pages 15-21, *supra*), shows that Congress viewed the phrase "personnel and medical and similar files" as encompassing all records containing private or personal information, with disclosure of such records to depend on the outcome of the balancing test. Moreover, the court of appeals' construction of "similar files" will produce anomalous results that Congress could never have intended.

1. Not all information contained in medical and personnel files can be accurately characterized as, on its face, highly "intimate." Yet under the literal language of Exemption 6—the significance of which the court of appeals perforce accepts—even information in medical and personnel files that is not *generically* an "intimate detail" may be withheld if, in

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system in which the personal information is contained, however, the court of appeals still erred in finding that the threshold showing had not been made here. The information sought by respondent, if it exists in Department of State files, would most likely be found in the Department's passport application files (see J.A. 11, ¶ 4). (Such information might, in some cases, also be found in files concerning the initiation of an expatriation proceeding.) These records, particularly the passport application records, contain much sensitive, personal information in addition to citizenship and passport status. Among the matters that may appear on a passport application form are the maiden name of the applicant's mother, the applicant's marital status (including divorces), and the purpose of the trip the applicant plans to take upon receipt of the passport. Since even the District of Columbia Circuit has held that marital status may be withheld under Exemption 6 if disclosure is clearly unwarranted (*Simpson* v. *Vance*, *supra*, 648 F.2d at 17), it would appear that the threshold test is met here, regardless of whether the test focuses on the system of records or the particular information sought.

the circumstances of a particular case, its disclosure would constitute a clearly unwarranted invasion of personal privacy. Under the court of appeals' "similar files" test, however, the *identical* personal information about the same individual would be ineligible for withholding if it were contained in a government file other than a medical or personnel file. This would be so because, notwithstanding the harm its disclosure would cause to the individual concerned, it would not be generically intimate information.[12]

The "intimate details" test devised by the court of appeals is predicated on the assumption that intimacy is a concept that applies in the same way to every individual—*i.e.*, that what is a matter of intimate concern to *A* would have similar significance to *B* or to anyone else, and that a court could easily identify categories of information that would not be a matter of intimate concern to *anyone* under any

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[12] Naturalization information, one type of data sought by respondent, may often appear in personnel files. See *Simpson* v. *Vance*, *supra*, where the court of appeals held that the State Department's "Biographical Register" was not a "personnel file" and therefore could only be protected under Exemption 6 as a "similar file." Under its "intimate details" test, however, the *Simpson* court concluded that the document did not qualify as a "similar file" because most of the information in question was not sufficiently personal or confidential. 648 F.2d at 14. Therefore, it ordered disclosure of the information without considering "the question of balancing." *Id.* at 17. The court reached this result even though it acknowledged that "all of the information can be found in a personnel file." *Id.* at 16. Presumably, if the plaintiff had made a direct request for the same information in the personnel file itself, the court would have engaged in the balancing process that it eschewed in *Simpson*.

circumstances. This is a dubious assumption,[13] and the category of citizenship and passport information at issue in this case is a good example of its unreliability. To many United States citizens residing in this country, citizenship may be simply a consequence of having been born here—a circumstance they accept without question and would readily reveal to anyone. To a native of Iran, however, United States citizenship necessarily represents a conscious choice, and continued adherence to that choice may well implicate "intimate" philosophical values, the public disclosure of which might create severe problems for the individual.[14] As Judge Lumbard observed (Pet. App. 5a), "[t]he facts of the case before us dramatically demonstrate that citizenship and naturalization information is often of a highly personal and potentially embarrassing nature."

The imposition of an "intimate details" test as a threshold barrier to Exemption 6 consideration of particular matters such as naturalization records clearly frustrates Congress' intention to establish "a proper balance between the protection of an individ-

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[13] Thus, one commentator has questioned the usefulness of the D.C. Circuit "similar files" test, observing:

> [*Simpson* v. *Vance* and *Sims* v. *CIA*] express an odd belief that it is possible to separate information that is "directly" personal (such as marital status) from information only "indirectly" personal (such as contractual relations or educational history). The distinction is unlikely to prove stable.

Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, IX(4) J. Legal Studies 775, 784 n.40 (Dec. 1980).

[14] See also, discussion at page 32 & note 18, *infra*.

ual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H.R. Rep. No. 1497, *supra*, at 11. Congress surely did not intend to require the government to cause injury to individuals through a clearly unwarranted invasion of their personal privacy simply because personal information concerning them is located in the wrong kind of government file or is not within a class of information the disclosure of which would be unlikely to injure *other* individuals in *other* circumstances.[15]

2. The fact that the information in the documents sought by respondent may also be found in court records open to the public does not justify the court of appeals' conclusion that the records at issue are not "similar files." Like naturalization information, marital status information is usually ascertainable, with some effort, from public records (see Pet. App. 5a; Lumbard, J., concurring). Nevertheless, the court below has held on more than one occasion that information about marital status is entitled to protection under Exemption 6. *Simpson* v. *Vance*, *supra*, 648 F.2d at 17; *Rural Housing Alliance* v. *United States Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974). Indeed, court records often contain personal

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[15] It should also be noted that the court of appeals' "intimate details" test does nothing to advance FOIA's primary purposes, which this Court has described as " 'pierc[ing] the veil of administrative secrecy and * * * open[ing] agency action to the light of public scrutiny'." *Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 361. That purpose is effectuated, rather, through application of the balancing test set forth in the second part of Exemption 6, which explicitly requires consideration of the public interest in disclosure.

information that would be considered quite intimate, and it would be wholly unresponsive to Congress' concerns in enacting Exemption 6 to eliminate that entire category of information from the exemption.[16]

To be sure, matters that are publicly declared in open court may be subject to diminished expectations of privacy,[17] but any such diminution is a factor that the courts should consider in applying the balancing portion of Exemption 6—*e.g.*, in determining whether the invasion of the privacy of Dr. Yazdi and Dr. Behzadnia is "clearly unwarranted"; it is not a factor that should bar Exemption 6 scrutiny altogether.[18] In any event, the request respondent has

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[16] Respondent asserted below that Exemption 6 is simply inapplicable to matters of public record (Ct. App. Br. 15-19) and that "[u]nlike a report which contains information regarding marital status, legitimacy of children, identities of fathers, medical condition, welfare payments, alcohol consumption, family fights and reputation, the fact of citizenship in and of itself is not fundamentally a private matter" (Ct. App. Br. 20-21). But most of the categories of information listed by respondent could be found in records of court proceedings involving, *e.g.*, paternity, disability benefits, or domestic relations.

[17] Respondent (Br. in Opp. 4-5) previously has attempted to take advantage of this principle by relying on a number of cases involving attempts by the states to prevent the press from publishing information obtained from court records. The government's construction of Exemption 6, however, in no way challenges the right of the press to publish court records. Respondent's invocation of these "gag" and "censorship" cases should not be permitted to divert the Court's attention from the issue of statutory construction present in this case.

[18] The likelihood that a publicly recorded fact may be embarrassing to the individual to whom it pertains depends, as one commentator has put it, on the extent to which that fact

made is not for copies of court records but for copies of State Department documents that may or may not include naturalization or expatriation records.[19] In

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"gives others a reason to shun, punish, or make fun of him." Kronman, *The Privacy Exemption to the Freedom of Information Act*, IX(4) J. Legal Studies 727, 752 (Dec. 1980). Because it is unlikely that most naturalized citizens would wish to conceal the fact of their citizenship from others, courts would be unlikely to characterize that fact as an "intimate or highly personal" detail. *Ibid.* Thus, the very concept of a "domain of 'intimate' facts" is premised on an unarticulated "general set of assumptions" about how others will react to particular facts about oneself. Kronman, *supra*, at 752. As the affidavits filed in this case demonstrate, however, and as Judge Lumbard observed in his concurring opinion (Pet. App. 5a), the "general set of assumptions" most persons would make about the fact of naturalization is simply inapplicable in the unique circumstances of this case—a consideration that the test applied by the decision below fails to take into account. (We are advised by the Department of State that circumstances in Iran are still such that disclosure of the fact that an Iranian native possessed, and was maintaining, United States citizenship and a United States passport could be highly dangerous to that individual. The Department has no information that it considers reliable that either of the individuals named in respondent's request is, at present, living outside of Iran.)

In assessing the significance of respondent's court records argument, insofar as it relates to legitimate expectations of privacy, it is worth noting that, as Judge Lumbard remarked (Pet. App. 5a), naturalization information "is difficult to locate." Naturalization may occur not only in federal district court but also in any state or territorial court of record. See 8 U.S.C. 1421(a).

[19] See 8 U.S.C. 1481(a). Expatriation proceedings are typically initiated in United States consulates abroad and are not the equivalent of public judicial proceedings. Respondent's request for documents revealing the *present* citizenship status of Drs. Yazdi and Behzadnia would necessarily encompass

essence, what respondent sought was confirmation or denial by the State Department of reported allegations denied by Dr. Yazdi (see J.A. 37) and of speculations regarding Dr. Behzadnia.[29] But as the affidavits of Assistant Secretary Saunders explained (see J.A. 16-18, 40-41), *either* confirmation *or* denial could cause harm to individuals—either to the two men concerned here or to similarly situated subjects of future requests. The State Department's perception of a danger to individuals even through a response that merely admits or denies allegations reported elsewhere is hardly irrational. As the Seventh Circuit recently remarked in an FOIA case, "official confirmation of public speculation may lead other gov-

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such expatriation records if either man had been naturalized and subsequently lost his citizenship for any of the reasons set forth in Section 1481(a). See 22 C.F.R. 50.41 and 50.51.

[29] The Immigration and Naturalization Service can do no more than report that its files indicate that a person with a particular name was naturalized on a given date and that it has—or has not, as yet—received from the Department of State any certificate of loss of nationality or expatriation for a person by that name. Applicable regulations do not require the Department to approve a certificate of loss of nationality or certificate of expatriation within any particular period of time, nor do they provide any deadline for the transmission of such certificates by the Department of State to INS. See 22 C.F.R. 50.41 and 50.51. Thus, the alleged statement by an INS employee regarding Dr. Yazdi, reported in the *Washington Post* article of October 4, 1979 (J.A. 38), was simply not conclusive evidence of Dr. Yazdi's current citizenship status, and it could be credibly denied by him (see J.A. 37). A response by the State Department to respondent's request, on the other hand, could be regarded as definitive. See *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975).

ernments to take some action that otherwise would not be taken had there been no confirmation." *Stein* v. *Department of Justice & FBI*, 662 F.2d 1245, 1259 (1981). See also *Phillippi* v. *CIA*, 655 F.2d 1325, 1330-1331 (D.C. Cir. 1981); *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975).

3. Federal agencies of necessity accumulate records containing personal data on a great number of persons, American and foreign born. In the hearings that preceded passage of the FOIA, government officials impressed upon Congress that, given the "range and volume" of personal information collected and the many different possibilities for injury to innocent individuals that could result from public disclosure, the problem of avoiding unnecessary injury through public disclosure was not amenable to a "simple solution." *Hearings on S. 1666 and S. 1663*, *supra*, at 199. See page 16, note 3, *supra*. Yet, under the court of appeals' decision, a simplistic test is applied to preclude agencies, as to much of the personal information in their files, from asserting Exemption 6 on the basis of the impact release might have on the individuals affected.

By its adoption of Exemption 6, Congress intended that the disclosability of personal information in agency files be determined under a single, flexible, balancing approach, with disclosure to depend upon a weighing of the invasion of privacy and the benefits of public access. See *Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 373. As this Court observed in *Rose* (*id.* at 372), "Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom

of Information Act 'to open agency action to the light of public scrutiny.' " The test devised by the court of appeals undermines this protection of individual privacy by establishing rigid, technical standards that will often mandate disclosure of information "which might harm the individual" (H.R. Rep. No. 1497, *supra*, at 11) without resort to such balancing. In light of the congressional purpose embodied in Exemption 6, however, Congress could not have desired to compel release of any personal record whose disclosure would constitute a clearly unwarranted invasion of privacy.

The congressional purpose is best accomplished by a holding that any item of personal information in the records of a federal agency, if not in a personnel or medical file, is a similar file for purposes of satisfying Exemption 6's threshold requirement. Satisfaction of this requirement, of course, means only that the information is *eligible* for withholding under Exemption 6, not that it will be withheld. Hence, contrary to respondent's assertions, this reading of "similar files" would not result in wholesale withholding of all personal information in agency records. Agencies will still have to determine, first, that the information is personal, second, that release of the information would constitute an invasion of privacy, and third, that any such invasion would be clearly unwarranted in view of the public interest in disclosure. But, in contrast to the court of appeals' approach, agencies would be able to engage in this analysis, and would be able to protect the privacy of individuals from unjustified harm, no matter which type of agency file contains the personal information.

Accordingly, we submit that the court of appeals erred in equating "similar files" with "intimate details" and in refusing to reach the critical balancing test that is at the heart of Exemption 6 and the interests it protects. Because the court below followed this misguided approach in assessing the propriety of the withholding at issue here, it was unable to take account of a factor that it recognized as legitimate—the Department of State's concern that specific individuals could be harmed, perhaps severely, by the disclosure requested by respondent (Pet. App. 4a).[21] This Court should therefore reverse the judgment below and remand the case so that the court of appeals may engage in the balancing of public and private interests mandated by Exemption 6.

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[21] The court of appeals remarked (Pet. App. 4a) that it was "sympathetic to the Department's reluctance to release these records" and that the "Department's concern" over the matter was "clear."

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for a determination whether the disclosure of the information sought by respondent would constitute a clearly unwarranted invasion of personal privacy.

Respectfully submitted.

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JANUARY 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 384144 755

Respondent's Brief

Office - Supreme Court, U.S.
FILED
FEB 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-535

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES DEPARTMENT OF STATE, *et al.*,
Petitioners,

v.

THE WASHINGTON POST COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether records which would indicate whether two prominent Iranian political figures are naturalized American citizens are eligible for withholding under Exemption 6 of the Freedom of Information Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-535

UNITED STATES DEPARTMENT OF STATE, *et al.*,
Petitioners,

v.

THE WASHINGTON POST COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT

STATUTES INVOLVED

8 U.S.C. § 1447 (1976) provides, in part:

"(a) Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose . . . ."

8 U.S.C. § 1448 (1976) provides, in part:

"(a) A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, take in open court an oath (1) to support the Constitution of the United States; (2) to renounce and adjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or of which the petitioner was before a subject or citizen; (3) to

> support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5)(A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by the law . . . ."

8 U.S.C. § 1450(e) (1976) provides:

> "It shall be the duty of the clerk of each and every naturalization court to cause to be filed in chronological order in separate volumes, indexed, consecutively numbered, and made a part of the records of such court, all declarations of intention and petitions for naturalization."

STATEMENT OF THE CASE

On September 11, 1979, respondent, The Washington Post Company,[1] filed a Freedom of Information Act (hereinafter "FOIA") request for State Department records indicating whether two prominent figures in the Iranian government are naturalized American citizens. (J.A. 8)[2] The request concerned Dr. Ibrahim Yazdi and Dr. Ali Behzadnia. To limit the request to information indicating whether Yazdi and Behzadnia are American citizens, respondent stated that if any State Department

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[1] Pursuant to Supreme Court Rule 28.1, respondent's subsidiaries are listed on page ii of respondent's Brief in Opposition to Petition for a Writ of Certiorari.

[2] References to the Joint Appendix filed in this Court are designated by "J.A." followed by the appropriate page number. References to the Appendix to the Petition for a Writ of Certiorari, the Appendix to the Memorandum of Respondent Suggesting That the Writ of Certiorari Be Dismissed as Improvidently Granted, and the Brief for the Petitioners are designated by "Pet. App.," "Mem. App.," and "Br. Pet.," respectively.

records indicating their citizenship also contained other information, that other information could be deleted. (J.A. 9)

Respondent commenced this lawsuit in the United States District Court for the District of Columbia on October 9, 1979, after the State Department had failed to respond to the request within the ten days prescribed by 5 U.S.C. § 552(a)(6)(C) (1976). On October 10, 1979, the State Department denied the request on the ground that the information sought falls within Exemption 6 of the FOIA, which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(6) (1976). (J.A. 14) Respondent filed an administrative appeal on October 12, 1979. (J.A. 19) Two months later, on December 12, 1979, the State Department Appeals Review Panel affirmed the denial of respondent's request. (J.A. 22-23)

Cross-motions for summary judgment were filed before the district court. In support of its motion, respondent argued that Exemption 6 was inapplicable given the public nature of citizenship and the undisputed fact that both naturalization and loss of citizenship are matters of public record. (J.A. 26-27) The Government's cross-motion rested on an affidavit of Assistant Secretary of State Harold H. Saunders, dated January 14, 1980. Assistant Secretary Saunders stated that, in view of anti-American sentiment in Iran, "[a]n official of the Government of Iran who is reputed to be an American citizen would, in my opinion, be in physical danger from some of the revolutionary groups that are prone to violence." (J.A. 17) The Saunders affidavit also indicated that although Yazdi had left his position as Foreign Minister in late 1979, he remained a member of the Revolutionary Council. *Ibid.* The affidavit stated that Behzadnia had been a senior official in the Ministry of National Guidance but that nothing was known of his current activities. *Ibid.*

On March 11, 1980, the district court granted respondent's motion for summary judgment. (Pet. App. 12a-13a) The court held that "the information sought is a matter of public record" and also concluded that "the public would best be served by disclosure of the information . . . ." *Ibid.* Accordingly, the court held that Exemption 6 does not allow the State Department to withhold the records in question.

The State Department subsequently filed a motion for reconsideration (J.A. 39), which was accompanied by a supplemental affidavit of Assistant Secretary Saunders, dated April 22, 1980. (J.A. 40-41) In his supplemental affidavit, Assistant Secretary Saunders stated that, in the interval since his first affidavit was filed, Dr. Yazdi had been elected to the Iranian National Assembly but that the State Department had "received no information about Dr. Behzadnia's activities in months." (J.A. 41) Saunders went on to reiterate his previously stated opinion that any person in Iran "suspected of having [an American] connection would likely be subject to severe scrutiny, suspicion and possible harm." *Ibid.* On May 16, 1980, the district court denied the State Department's motion for reconsideration but granted its motion for a stay pending appeal. (Pet. App. 14a)

The court of appeals affirmed in a *per curiam* opinion, with Judge Lumbard concurring separately. (Pet. App. 1a) The court held that records indicating that a person is a naturalized citizen are not comparable to "personnel and medical files" and therefore do not constitute "similar files" within the meaning of Exemption 6. (Pet. App. 2a-3a) The court emphasized that the fact of citizenship is "no more personal than the dates of naturalization held nonexempt in *Simpson* [v. *Vance*, 648 F.2d 10 (D.C. Cir. 1980)]." (Pet. App. 3a; footnote omitted) In response to the Government's contention that release of the records would subject Yazdi and Behzadnia to a threat of physical harm, the court of appeals observed that the

Government " 'is attempting to fit a square peg in a round hole'; 'Congress did not design Exemption 6 to encompass the withholding of information on the basis of the physical security [of persons stationed or residing overseas].' " (Pet. App. 4a (*quoting Simpson* v. *Vance*, 648 F.2d at 17); brackets supplied by the court of appeals) Because the court concluded that the records sought do not constitute "similar files," it did not reach the question whether the interest in disclosure is clearly outweighed by any threat that disclosure might pose to Yazdi and Behzadnia. (Pet. App. 4a)

Following the denial of its petitions for rehearing and rehearing *en banc*, the State Department filed a petition for certiorari in this Court. By order dated November 9, 1981, the petition was granted. (J.A. 43) Respondent was served with the Government's brief on the merits on January 9, 1982. On January 20, 1982, respondent filed a memorandum suggesting that the writ of certiorari be dismissed as improvidently granted.

STATEMENT OF THE FACTS

At the time respondent's Freedom of Information Act request was filed, Dr. Yazdi held the position of Foreign Minister in the government of Prime Minister Bazargan. (J.A. 17) Yazdi left that position when Prime Minister Bazargan's government resigned following the takeover of the American Embassy in Teheran on November 4, 1979. (J.A. 17) He retained a position on the Revolutionary Council, however, and assumed "responsibilities for dealing with the problems of the various regions of Iran." (J.A. 17) In early 1980, Dr. Yazdi was elected to the National Assembly, the Iranian parliament. (J.A. 41)

On November 4, 1981, Indiana University Press published *Inside the Iranian Revolution*, by John D. Stempel, Director of the State Department Operations Center. In a chapter entitled "Takeover!", Director Stempel states

that "Yazdi never renounced his naturalization in 1962 and even today is an American citizen." *Id.* at 166. (Mem. App. D, 9a) On November 23, 1981, W. W. Norton & Company published *Mission to Iran*, by William H. Sullivan, former United States Ambassador to Iran, who describes Dr. Yazdi as "an Iranian immigrant to the United States who had lived many years in Houston, Texas, and acquired United States nationality." *Id.* at 200. (Mem. App. E, 10a) On December 4, 1981, the *Iran Times* reported that the government news agency Pars had announced that Yazdi "wrote Majlis [National Assembly] Speaker Hashemi Raisanjani asking him to tell the Foreign Ministry to tell the American government it was free to release documents related to his citizenship." (Mem. App. F, 11a)

Prior to the takeover of the American Embassy in Teheran, Dr. Behzadnia held a senior position in the Iranian Ministry of National Guidance. (J.A. 17) Whether he remained in Iran in late 1979 and early 1980 is not known. (J.A. 17, 41) On November 13, 1981, however, the *Iran Times* reported that Dr. Behzadnia is now living in Michigan, and that it had spoken to him at his home there. (Mem. App. C, 6a-8a)

SUMMARY OF ARGUMENT

Information indicating whether a person is a naturalized American citizen is not eligible for withholding under Exemption 6 of the Freedom of Information Act. A record indicating that a person is a naturalized citizen of the United States does not implicate any legitimate expectation of personal privacy. Citizenship is a public fact, not a private fact.

The plain words of Exemption 6 limit it to "personnel and medical files and similar files." Since the purpose of the exemption is to protect "personal privacy," information is "similar" to personnel and medical files only if it implicates a similar interest in personal privacy.

The Government's contention that *any* information concerning a particular person is within the ambit of the exemption (Br. Pet. 20, 24), and can be withheld if disclosure would be "clearly unwarranted," is at odds with the clear language of the statute. The Government's proposed interpretation also ignores Congress' overriding purpose of eliminating the "for good cause found" exemption that had made § 3 of the Administrative Procedure Act of 1946 (hereinafter "APA"), 60 Stat. 237, 238, *codified at* 5 U.S.C. § 1002 (1964), "more . . . an excuse for withholding than . . . a disclosure statute." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (hereinafter "S. Rep. No. 813"). The legislative history of Exemption 6 provides further evidence that Congress' concern was with records containing "intimate details," H. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (hereinafter "H. Rep. No. 1497"), and "highly personal" information, S. Rep. No. 813 at 9. Finally, the case law under Exemption 6 recognizes that records constitute "similar files," and are therefore eligible for withholding, only if they are "similar" to personnel and medical files in the respect that the basic purpose of Exemption 6 makes critical: they must "implicate[] *similar privacy values* . . . ." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 376 (1976) (emphasis supplied).

The Government also errs in advancing the alternative contention that information is private simply because its disclosure might lead to embarrassment or physical harm. (Br. Pet. 19) The notion that the potential for embarrassment is sufficient to make information private is inconsistent with "the very idea of a domain of 'intimate' facts and the accompanying belief that personal privacy has a discernible core." Kronman, *The Privacy Exemption to the Freedom of Information Act*, 9 J. Legal Studies 727, 752 (1980). If the possibility of embarrassment were the test of privacy, information revealing that a government contractor had performed his work incompetently would be private. *See Sims* v. *CIA*,

642 F.2d 562, 575 (D.C. Cir. 1980). Yet such information clearly is not private in any meaningful and legitimate sense.

Nor is information private simply because there is a possibility that its disclosure might lead to physical harm. The possibility of misuse by third parties does not make information intimate or highly personal. When Congress wanted to create an exemption to protect against the possibility of physical harm, it did so. Exemption 7(F) authorizes nondisclosure of investigatory records compiled for law enforcement purposes where disclosure would "endanger the life or safety of law enforcement personnel." 5 U.S.C. § 552(b)(7)(F) (1976). Exemption 6 contains no provision of this sort; it is addressed solely to private information contained in personnel and medical files and similar files.

Since the term "similar files" applies only to records implicating an interest in personal privacy akin to that implicated by personnel and medical files, records indicating whether Yazdi and Behzadnia are naturalized American citizens are eligible for withholding under Exemption 6 only if (1) a naturalized citizen has a legitimate expectation of privacy with respect to his status as a citizen; and (2) assuming that citizenship does implicate an interest in personal privacy, that interest is similar to the privacy interest attaching to personnel and medical files.

A record indicating that a person is a naturalized American citizen does not implicate any interest in personal privacy. Citizenship is a public fact for several reasons. First, the law requires that the final hearing on every naturalization petition be held in open court. Naturalization ceremonies are conducted in open court to guarantee "publicity throughout the entire proceedings." *United States* v. *Ginsberg*, 243 U.S. 472, 475 (1917). Second, once a person has been naturalized as a citizen, that fact is embodied in a final order entered

in the records of the naturalization court. Those records are available for public inspection. Finally, citizenship is a status of public, not private, significance. To be a citizen is to be a member of the political community. Citizens "owe allegiance to the Government, and the Government owes to them the duty of protection." *United States* v. *Schwimmer*, 279 U.S. 644, 649 (1929). Citizenship and the rights and obligations that accompany it are not private matters.

Even assuming that some conceivable privacy interest attaches to the fact that a person is a citizen of the United States, that interest is in no way similar to the privacy interest that would be compromised by the disclosure of personnel or medical files. Since a record indicating a person's citizenship does not constitute a "similar file," it is not eligible for withholding under Exemption 6.

ARGUMENT

I. ONLY RECORDS THAT IMPLICATE AN INTEREST IN PERSONAL PRIVACY SIMILAR TO THAT ATTACHING TO PERSONNEL AND MEDICAL FILES CONSTITUTE "SIMILAR FILES" WITHIN THE MEANING OF EXEMPTION 6.

The FOIA "springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits." Statement by President Johnson upon signing Public Law 89-487 (July 4, 1966). The enactment of the FOIA reflected a recognition by Congress that § 3, the public disclosure section of the APA, "allow[ed] agencies to deny legitimate information to the public." S. Rep. No. 813 at 3. As the Court noted in *EPA* v. *Mink*, 410 U.S. 73, 79 (1973), § 3 of the APA "was plagued with vague phrases" that gave agencies practically unlimited discretion to withhold Government records from public scrutiny. Information was withheld "only to cover up embarrassing mistakes . . . and the withholding justified

by such phrases in section 3 . . . as—'requiring secrecy in the public interest,' or 'required for good cause to be held confidential.'" S. Rep. No. 813 at 3.

The FOIA was intended to eliminate such open-ended phrases and establish "'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Department of the Air Force* v. *Rose*, 425 U.S. 352, 360-61 (1976) (*quoting* S. Rep. No. 813 at 3). "To make crystal clear the congressional objective . . . Congress provided in § 552(c) that nothing in the Act should be read to 'authorize withholding of information . . . , except as *specifically* stated . . . .'" *Department of the Air Force* v. *Rose*, 425 U.S. at 361 (emphasis supplied). *See* Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 783 (1967) ("[t]he pull of the word 'specifically' is toward emphasis on statutory language"). This Court has recognized that "disclosure, not secrecy, is the dominant objective of the Act," and that the exemptions therefore "must be narrowly construed." *Department of the Air Force* v. *Rose*, 425 U.S. at 361.

5 U.S.C. § 552(a)(3) (1976) provides in pertinent part:

> "[E]ach agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."

It is undisputed that this provision entitles respondent to records indicating whether Dr. Yazdi and Dr. Behzadnia are naturalized American citizens, unless those records fall within Exemption 6, which encompasses "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of per-

sonal privacy."[3] 5 U.S.C. § 552(b)(6) (1976). It is also undisputed that the records at issue do not constitute "personnel" or "medical" files. And it is undisputed that citizenship is a matter of public record. The only questions are whether the requested records constitute "similar files," and, if so, whether disclosure would be "clearly unwarranted."

The Government maintains that the court of appeals erred in holding that a record indicating that a person is a naturalized American citizen does not constitute a "similar file," and therefore cannot be withheld under Exemption 6, because it does not threaten privacy values similar to those threatened by personnel and medical files. First, the Government contends that "*any* information . . . directly pertaining to an individual" is eligible for withholding under Exemption 6. (Br. Pet. 24; emphasis supplied) According to the Government, any agency record that concerns a "particular individual" is within the ambit of the exemption and can be withheld if disclosure would be "clearly unwarranted." (Br. Pet. 20) Alternatively, the Government appears to contend that the information sought here is private because its disclosure might embarrass Yazdi and Behzadnia and might subject them to danger. (Br. Pet. 19)

Both contentions are without merit. Contrary to the Government's first contention, Exemption 6 does not apply to "any information . . . directly pertaining to an individual . . . ." (Br. Pet. 24) The language of the exemption, the purpose of the statutory scheme, the legislative history, and the case law all support the court of appeals' conclusion that Exemption 6 has a much more

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[3] The Government does not claim that the records are exempt from disclosure by virtue of Exemption 1, which encompasses matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (1976).

limited scope: *it applies only to information that implicates personal privacy interests similar to those attaching to personnel and medical files.* Contrary to the Government's second contention, information is not private simply because its disclosure might result in embarrassment or even danger.

A. Exemption 6 Is Limited to Information the Disclosure of Which Would Threaten a Personal Privacy Interest Similar to That Attaching to Personnel and Medical Files.

1. *The Language of the Exemption and the Purpose of the Statutory Scheme.*

By its own terms, Exemption 6 is limited to records that threaten personal privacy interests akin to those implicated by personnel and medical files. The exemption contains two critical phrases that refute the Government's assertion that any information concerning an identifiable person is within its ambit. The first phrase is "personnel and medical files and similar files." The second is "invasion of personal privacy." Together, they evidence a clear and unmistakable Congressional intent that the exemption apply not to all "information directly pertaining to an individual" (Br. Pet. 24), but only to information that implicates a personal privacy interest comparable to that implicated by information in personnel and medical files.

Congress could have created an exemption embracing

> (6) any file concerning a person the disclosure of which would be clearly unwarranted.

Such a catch-all exemption, not limited to files containing private information, would have made an enormous range of Government records—any record pertaining to an identifiable person—eligible for withholding. For this entire category of Government records, the "for good

cause found" standard of § 3 of the old APA, 60 Stat. at 238, would have been perpetuated.

Congress rejected this approach. In keeping with its fundamental objective of eliminating the open-ended exemptions that had vitiated § 3 of the APA, Congress enacted a far narrower exemption, one restricted to "*personnel and medical files and similar files* the disclosure of which would constitute a clearly unwarranted *invasion of personal privacy.*" (Emphasis supplied.)

Not every file concerning a person is eligible for withholding under Exemption 6. Only "personnel and medical files and similar files" may qualify. These are words of limitation. In a case such as this, where it is undisputed that the files are not personnel or medical files, the threshold question is whether they are *similar* to personnel and medical files.

In what respect must they be similar? When the entire exemption is read, the requisite similarity becomes clear. The purpose of the exemption is to protect "personal privacy." The word "similar" must be given an interpretation consistent with this purpose.[4] To be eligible for withholding under Exemption 6, information must implicate a personal privacy interest comparable to that attaching to personnel and medical files.

2. *The Legislative History.*

Apparently recognizing that the language of Exemption 6 does not support its proposed interpretation (Br. Pet. 14-15), the Government relies heavily on the legis-

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[4] Conversely, the phrase "personnel and medical files and similar files" limits the term "personal privacy." The specific references to personnel and medical files indicate that Congress used the term "personal privacy" not in the loose sense that some commentators have used it, but rather to denote the interest an individual has in controlling the disclosure of highly personal information about himself.

lative history of the exemption. The Government argues that the legislative history evidences a Congressional intention that Exemption 6 provide a vehicle for the balancing of the competing interests supporting disclosure and nondisclosure for *every* record pertaining to a particular, identifiable individual. (Br. Pet. 15-21) This contention is without merit.

That Exemption 6 was designed solely to reach information of a private nature, rather than all information concerning an identifiable person, is evident from both the House and Senate reports on S. 1160, the bill that became the Freedom of Information Act. The House Report states that Exemption 6 was included because "[s]uch agencies as the Veterans' Administration, Department of Health, Education and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing *intimate details* about millions of citizens." H. Rep. No. 1497 at 11.[5] Similarly, the Senate Report explains that Exemption 6 was included because "[s]uch agencies as the Veterans' Administration, Department of Health, Education and Welfare, Selective Service, etc., have great quantities of files" that are "*highly personal* to the person involved."[6] S. Rep. No. 813 at 9 (em-

[5] The Government seizes upon the statement in the House Report that "[t]he limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's *right of privacy* and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H. Rep. No. 1497 at 11 (emphasis supplied). (Br. Pet. 18-19) But there is no need to balance competing rights where release of information does not threaten anyone's "right of privacy."

[6] Petitioners attempt to derive support from the statement in the Senate Report that "the scope of the exemption is held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.'" S. Rep. No. 813 at 9. (Br. Pet. 17-18) This statement in no way suggests that the exemption is not *also* held in bounds by the phrase "personnel and medical files and similar files"; to say that an exemption is limited by one constraint does not mean that that is the only constraint.

phasis supplied). These references to records that contain "intimate details" and are "highly personal" underscore Congress' intent that Exemption 6 be limited to truly private information.

Furthermore, the legislative history buttresses the conclusion that to be eligible for withholding under Exemption 6, data concerning an individual must not only implicate a privacy interest; it must implicate a privacy interest *akin to that implicated by personnel and medical files.* Several of the bills introduced prior to the actual passage of the FOIA contained a privacy exemption, but did not restrict the exemption to "personnel and medical files and similar files." These earlier bills authorized withholding of any information the disclosure of which would constitute "a clearly unwarranted invasion of personal privacy." *See* S. 2148, 85th Cong., 1st Sess. § 3(f)(3) (1957) ("subject matter . . . of such a nature that disclosure would be a clearly unwarranted invasion of personal privacy"); S. 1070, 86th Cong., 1st Sess. § 1002(f)(4) (1959) ("subject matter . . . the disclosure of which would be a clearly unwarranted invasion of personal privacy"); S. 2780, 86th Cong., 2d Sess. § 3(f)(4) (1960) ("subject matter . . . of such a nature that disclosure would be a clearly unwarranted invasion of personal privacy"); H.R. 9926, 87th Cong., 2d Sess. § 1002(f)(4) (1962) ("subject matter . . . the disclosure of which would be a clearly unwarranted invasion of personal privacy"). The absence of the words "personnel and medical files and similar files" in previous bills highlights what the language of the FOIA itself makes clear: that those are words of limitation imposing a threshold test that information must satisfy to be eligible for withholding. The term "similar files" is not "simply . . . a generic descriptive device" (Br. Pet. 19) applicable to any record that concerns a particular person.

3. *The Case Law.*

In *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976), this Court recognized that Exemption 6 does not embrace all information that concerns specific, identifiable individuals. *Rose* involved an FOIA request for case summaries of honor and ethics hearings held by the United States Air Force Academy. The Court concluded that the case summaries were "similar files" for two reasons:

> "First, they relate to the discipline of cadet personnel . . . . *Second, and most significantly, the disclosure of these summaries implicates similar privacy values . . . .*"

Id. at 376 (emphasis supplied). *Rose* thus held that whether records constitute "similar files" depends primarily upon whether they threaten privacy interests similar to those attaching to personnel and medical files.

The *Rose* standard has been adopted explicitly in several lower court decisions. For example, in *Pacific Molasses Co.* v. *NLRB*, 577 F.2d 1172 (5th Cir. 1978), the Fifth Circuit rested its interpretation of the term "similar files" squarely on this Court's conclusion in *Rose* that the case summaries at issue constituted "similar files" because disclosure " *'implicates similar privacy values.'* " *Id.* at 1180 (*quoting* 425 U.S. at 376; emphasis supplied by the Fifth Circuit). The Fifth Circuit concluded that "the test for determining whether information is a 'similar file' must turn on whether information is of a *sufficiently personal* nature." 577 F.2d at 1179 (emphasis supplied).[7] Likewise, in *Kurzon* v. *Depart-*

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[7] The Government relies (Br. Pet. 26) on the statement in *Pacific Molasses* that information satisfies the "similar files" requirement if it is of a "personal nature." 577 F.2d at 1180 n.5, 1181. In context, however, it is clear that the court used the term "personal" not to refer to any information concerning a person,

ment of Health and Human Services, 649 F.2d 65 (1st Cir. 1981), the First Circuit emphasized that

> "by initially concentrating on the comparable traits of the information requested and the sorts of data

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but rather to refer only to matters that are private. This is evident from the Fifth Circuit's statement that information must be "sufficiently personal" to constitute a similar file. If the Fifth Circuit had used "personal" to refer to anything concerning a person, it would be meaningless to say information must be "sufficiently personal"; information either concerns a particular person or it does not.

The Government's reliance (Br. Pet. 26-27) on an excerpt from the Sixth Circuit's opinion in *Madeira Nursing Center, Inc.* v. *NLRB*, 615 F.2d 728 (1980), is misplaced for the same reason. There is no basis for concluding that the Sixth Circuit used the word "personal" to refer to anything concerning a person.

The actual holdings of *Pacific Molasses* and *Madeira*—that union authorization cards are "similar files" and that their disclosure would constitute "a clearly unwarranted invasion of personal privacy"—provide no more support for the Government than the language that the decisions use in applying the "similar files" requirement. As the Fifth Circuit noted in *Pacific Molasses*, "employees have a strong privacy interest in their personal sentiments regarding union representation, and . . . this right to privacy is a right necessary to full and free exercise of the organizational rights guaranteed by the National Labor Relations Act." 577 F.2d at 1182 (footnote omitted). It is a well established principle of labor law that an employee has a substantial and legitimate interest in keeping to himself his decision whether to support unionization. *See, e.g., NLRB* v. *District 50, United Mine Workers*, 355 U.S. 453, 460 (1958) (representation elections allow employees to choose "in 'the privacy and independence of the voting booth,' . . . whether or not they desire to be represented" by the union) (*quoting Brooks* v. *NLRB*, 348 U.S. 96, 100 (1954)); *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 332 (1946) ("privacy of the voting process"); *Automated Business Systems* v. *NLRB*, 497 F.2d 262, 276 (6th Cir. 1974) (Edwards, J., concurring in part and dissenting in part). Although the National Labor Relations Act expressly insures privacy only with respect to elections, 29 U.S.C. § 159(c)(1) (1976), employees have a comparable privacy interest with respect to authorization cards, since a union must ordinarily collect cards

> compiled in medical and personnel files, the court can focus its attention closely on the type of *privacy* interest Congress had in mind before weighing that interest against the public interest in disclosure."

Id. at 67 (emphasis in original). Analyzing Exemption 6 in this fashion, Chief Judge Coffin concluded that the names and addresses of unsuccessful applicants for research grants from the National Cancer Institute are "not sufficiently personal or private to satisfy the 'similar file' requirement." [8] *Id.* at 69. *Accord, Robles* v.

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signed by 30% of the employees in order to have an election held in the first place. *See NLRB* v. *Biophysics Systems, Inc.*, 91 L.R.R.M. 3079, 3081 (S.D.N.Y. 1976) ("The interest in confidentiality which attaches to a union authorization card approaches that which surrounds the secret ballot in an election.").

[8] Although the First Circuit also concluded that, in any event, disclosure of the names and addresses was not clearly unwarranted, 649 F.2d at 69, an examination of the opinion belies the Government's assertion (Br. Pet. 26 n.10) that the court's resolution of the "similar files" issue was "influenced" by its conclusion that disclosure would be warranted even if the information sought did constitute "similar files." Chief Judge Coffin's carefully reasoned opinion explicitly states that the two questions should be considered separately, 649 F.2d at 67, and then proceeds to do just that. It is also worth noting that *Kurzon* cites with approval the decision of the court of appeals in this case. *Id.* at 70 n.5.

The Government errs in relying on *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133 (3d Cir. 1974). (Br. Pet. 25) *Wine Hobby* concerned a request for lists of "the names and addresses of all persons who have registered with the United States Bureau of Alcohol, Tobacco and Firearms to produce wine for family use in the Mid-Atlantic region." 502 F.2d at 134. The court explicitly stated that it had to determine "whether release of the names and addresses would constitute an invasion of *personal privacy* and, *if so*, balance the seriousness of that invasion with the purpose asserted for release." *Id.* at 136 (emphasis supplied). There is nothing in this language that supports the Government's novel contention that Exemption 6 "encompass[es] any information of a personal nature—*i.e.*, information directly pertaining to an individual." (Br. Pet. 24)

Nor does the Government's proposed test find any support in the holding in *Wine Hobby* that the lists could be withheld under

EPA, 484 F.2d 843, 845 (4th Cir. 1973) ("the exemption applies only to information which relates to a specific person or individual" and involves " 'intimate details' of a 'highly personal nature' in that individual's employment record or health history or the like") (*quoting Getman* v. *NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971)). *Cf. Tennessean Newspaper, Inc.* v. *Levi*, 403 F. Supp. 1318, 1320-21 (M.D. Tenn. 1975) (to be eligible for withholding under Exemption 7(C), the "potential invasion must involve substantial and not minimal privacy concerns").

The District of Columbia Circuit has followed the same approach. Thus in *Rural Housing Alliance* v. *United States Department of Agriculture*, 498 F.2d 73 (1974),

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Exemption 6. The court concluded that the lists of registrants maintained by the Bureau of Alcohol, Tobacco and Firearms were private in three respects. First, the lists disclosed "each registrant's home address, information that the individual may fervently wish to remain confidential or [be] only selectively released." 502 F.2d at 137. As the court observed, "[t]hat society recognizes the individual's interest in keeping his address private is indicated in such practices as non-listing of telephone numbers and the renting of post office boxes." *Id.* at 137 n.15. Second, the lists disclosed "personal activities within the home, namely wine-making . . . ." *Id.* at 137. The court noted that "there are few things which pertain to an individual in which his privacy has traditionally been more respected than his own home." *Id.* at 136-37. Third, the lists disclosed "information concerning the family status of the registrant, including the fact that he is not living alone and that he exercises family control or responsibility in the household." *Id.* at 137. The lists disclosed such information because the applicable regulations limited registration for wine-making in the home to the "head of any family," defined as a person who "exercises family control or responsibility over one or more individuals closely connected with him by blood relationship, relationship by marriage, or by adoption, and who are living with him in one household." 26 C.F.R. §§ 240.540-543 (1974). *See* 502 F.2d at 134 n.6. In light of the three aspects of personal privacy at stake in *Wine Hobby*, the decision plainly does not indicate that any information concerning a particular person satisfies the threshold test for withholding under Exemption 6.

the court held that a Department of Agriculture report was eligible for withholding because "the report involves sufficiently intimate details to be a 'similar' file under exemption 6." *Id.* at 77. In *Board of Trade* v. *Commodity Futures Trading Commission*, 627 F.2d 392 (1980), the court stated that the threshold test under Exemption 6 requires, first, that information concern "some privacy interest," *id.* at 397, and second, that the interest be "of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records." *Id.* at 398. Applying this test, the court ruled that records identifying trade sources of the Commodity Futures Trading Commission who supplied information concerning the Chicago Board of Trade's plywood futures contract do not come within the purview of Exemption 6, because the records "associate[] these individuals with business of the Board, and not with any aspect of their personal lives." *Id.* at 399-400. In *Sims* v. *CIA*, 642 F.2d 562 (1980), the court reaffirmed *Board of Trade* and emphasized that "Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships." *Id.* at 575. *Sims* held that Exemption 6 did not authorize the withholding of a list of persons and institutions conducting scientific and behavioral research under contracts with or funded by the CIA. *See also Simpson* v. *Vance*, 648 F.2d 10, 13 (D.C. Cir. 1980) (to be eligible for withholding under Exemption 6, "data must be 'of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records' ") (quoting *Board of Trade* v. *Commodity Futures Trading Commission*, 627 F.2d at 398).

B. Information Is Not Private Simply Because Its Disclosure Might Lead to Embarrassment or Even Physical Harm.

The Government asserts that, even if citizenship is not ordinarily a private fact, it is in this case because Dr.

Yazdi and Dr. Behzadnia are living in Iran[9] and the disclosure that they are American citizens "would be not only embarrassing but dangerous." (Br. Pet. 11) The Government maintains that the term "similar files" was intended to embrace "the countless varieties of government records containing personal information having the potential for harm or embarrassment in particular cases." (Br. Pet. 19; footnote omitted) Implicit in this argument is the assumption that information concerning an individual is private if its disclosure might embarrass him or subject him to danger. This assumption cannot withstand scrutiny.

The potential for embarrassment does not make information private. Thus, for example, in *Sims* v. *CIA*, 642 F.2d 562 (D.C. Cir. 1980), the court rejected the contention that a list of persons conducting research in connection with the CIA is private because disclosure of the list might be embarrassing to the persons on it:

> "Although the threat of embarrassment was a significant factor in *Rose*, the Court was also at pains to note that the records of the panels at the Air Force Academy involved judgments about matters that are intimate and personal in the highest degree—judgments of ethical propriety and individual honor. There was no implication that 'embarrassment' alone would have sufficed to justify nondisclosure. Clearly Exemption 6 could not be invoked, under *Rose*, to protect the concerns of a contractor who would be embarrassed by disclosure of his responsibility for shoddy work. No more should it reach the names of those embarrassed by the nature of the contract work they have undertaken."

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[9] This assertion is based on former Assistant Secretary Saunders' affidavits of January 14, 1980, and April 22, 1980. Neither of those affidavits stated that Behzadnia was still living in Iran at the time the affidavits were filed. On November 13, 1981, the *Iran Times* reported that Behzadnia is now living in Michigan and that it had spoken to him at his residence there. (Mem. App. C, 6a-8a)

Id. at 575 (citations and footnote omitted). An individual's subjective desire to keep information secret is not enough to make it private. There has to be a legitimate and reasonable expectation that the information will not be disclosed. *Cf. Smith* v. *Maryland*, 442 U.S. 735, 740 (1979) (subjective expectation of privacy is insufficient to create an interest protected by the Fourth Amendment).

The point is well expressed in a thoughtful article by Professor Kronman, *The Privacy Exemption to the Freedom of Information Act*, 9 J. Legal Studies 727 (1980), from which the Government itself quotes. (Br. Pet. 32 n.18) The thrust of the passage cited by the Government is quite the opposite of what the Government's brief suggests. The passage in question criticizes the observation in *Ditlow* v. *Shultz*, 517 F.2d 166, 169 n.12 (D.C. Cir. 1975), that although information concerning a person's travels is not "intimate" or "highly personal," "[o]ne can speculate instances in which disclosure of such information might prove embarrassing . . . ."[10] Professor Kronman points out that "any fact about a person, however innocuous, is potentially embarrassing." Kronman, *supra*, at 752. The possibility of embarrassment therefore cannot be enough to make a fact "an 'intimate or highly personal' detail." *Ibid.* Such a test would leave the concept of privacy without any meaningful content:

> "The important point, worth emphasizing, is that the very idea of a domain of 'intimate' facts and the accompanying belief that *personal privacy has a discernible core* only make sense against the background of a more general set of assumptions regarding the uses people typically make of information about others in arranging their social interactions."

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[10] *Ditlow* involved customs declaration forms. Because of the procedural posture of the case, the court did not decide the Exemption 6 issue on the merits.

Ibid. (Emphasis supplied.) Far from supporting the Government's attempt to make any potentially embarrassing information eligible for withholding under Exemption 6, Professor Kronman's article explains why the possibility of embarrassment cannot be the test of whether information is private.

For the same reasons, the potential for physical harm does not make information private. Although recent disclosures indicating that Dr. Yazdi is an American citizen and that Dr. Behzadnia is now living in Michigan make it extremely doubtful that confirmation of their citizenship would subject them to any danger that they do not now face, the possibility of such harm has no bearing on the question whether the records contain private information. Information does not become private merely because third parties may misuse it. *See Simpson* v. *Vance*, 648 F.2d 10, 17 (D.C. Cir. 1980). Exemption 7(F) of the FOIA shows that Congress knew how to create an endangerment exemption when it concluded that such an exemption was justified. Exemption 7(F) encompasses investigatory records compiled for law enforcement purposes the disclosure of which would "endanger the life or safety of law enforcement personnel . . . ." 5 U.S.C. § 552(b)(7)(F). Exemption 6 contains no comparable provision.

C. The Courts Below Properly Interpreted Exemption 6.

In this case both the district court and the court of appeals held that information indicating whether a person is a naturalized American citizen is not comparable to information contained in personnel and medical files. (Pet. App. 2a-3a, 12a) The decisions below do not give Exemption 6 a more restrictive interpretation than that required by the language of the exemption, the purpose of the statutory scheme, the legislative history, and the decisions of this Court and of other Circuits.

II. A RECORD DISCLOSING WHETHER A PERSON IS A NATURALIZED AMERICAN CITIZEN DOES NOT IMPLICATE AN INTEREST IN PERSONAL PRIVACY SIMILAR TO THAT ATTACHING TO PERSONNEL AND MEDICAL FILES.

A. A Naturalized Citizen Can Have No Legitimate Expectation of Privacy With Respect to the Fact That He Is An American Citizen.

Although both the district court and the court of appeals properly interpreted the term "similar files," the information at issue here would not be eligible for withholding under Exemption 6 no matter how that term is interpreted. Whether a person is a naturalized American citizen is not a private fact. Every applicant for citizenship must take an oath of allegiance in open court before the public. Every time a new citizen is naturalized, that fact is entered in court records that are available for public inspection. And citizenship, by its very nature, is a status of public, not private, significance. For all these reasons, citizenship is a public fact as to which there can be no legitimate expectation of privacy.

1. *The Law Requires That Naturalization Proceedings Be Held in Open Court.*

The clearest indication that naturalized citizenship is a public fact is the requirement—which has been the law of the land since 1906—that every naturalization proceeding be held in open court. In the Naturalization Act of 1906, 34 Stat. 596, Congress expressly provided that "[e]very final hearing upon a petition for naturalization shall be had in open court . . . ." 8 U.S.C. § 1447(a) (1976). To become a naturalized citizen, an individual must take an oath of allegiance "in open court . . . ." 8 U.S.C. § 1448(a) (1976).[11]

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[11] Naturalization ceremonies are often attended by many members of the public. On February 29, 1952, Congress approved a Joint Resolution providing in pertinent part:

As this Court has recognized, these requirements are designed to ensure "publicity throughout the entire proceedings." *United States* v. *Ginsberg*, 243 U.S. 472, 475 (1917). The statute's "plain language repels the idea that any part of a final hearing may take place in chambers, whether adjoining the court room or elsewhere." *Ibid.* A court has "no warrant to prosecute any inquiry in the matter save in open court." *United States* v. *Olsen*, 272 F. 706, 720 (W.D. Wash. 1921).

The result of a proceeding required by law to be open to the public cannot be a private fact under the FOIA. Congress cannot have intended that agencies could with-

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"Either at the time of the rendition of the decree of naturalization or at such other time as the judge may fix, the judge or someone designated by him shall address the newly naturalized citizen upon the form and genius of our Government and the privileges and responsibilities of citizenship; it being the intent and purpose of this section to enlist the aid of the judiciary, in cooperation with civil and educational authorities, and patriotic organizations in a continuous effort to dignify and emphasize the significance of citizenship."

66 Stat. 9. To "dignify and emphasize the significance of citizenship," many courts invite various civic organizations to participate in naturalization ceremonies:

"Numerous organizations, groups, and individuals have participated wholeheartedly in naturalization ceremonies throughout the country and have contributed immeasurably to the impressiveness of the occasions. Not all of these can be listed here. They have included, however, members of the judiciary and of bar associations; the Armed Forces of the United States; the American Legion and other veterans' organizations; the Daughters of the American Revolution; Colonial Dames of America; General Federation of Women's Clubs; National Council of Jewish Women; Boy Scouts of America; Elks; Kiwanis; Rotary; Lions; Civitan clubs; Chambers of Commerce; churches of all denominations; schools; social agencies; and labor organizations."

United States Department of Justice, Immigration and Naturalization Service, *Gateway to Citizenship* 27 (1971 rev.).

hold information that indicates nothing more than the outcome of a proceeding *that Congress has itself said must be conducted in public.* The notion that citizenship is a private matter is inconsistent with Congress' intent to ensure that every naturalization proceeding be "open and before the public." 40 Cong. Rec. 3643 (1906) (remarks of Rep. Bonynge). The public nature of a naturalization proceeding stands in stark contrast to the confidential nature of Air Force Academy honor and ethics hearings. *Contrast Department of the Air Force* v. *Rose*, 425 U.S. 352, 359 (1976) ("all matters discussed at the hearing are confidential and should not be discussed outside the room with anyone other than an honor representative").

The absence of any legitimate interest in privacy is especially clear since naturalization proceedings are voluntarily initiated by the applicant for citizenship. As Warren and Brandeis recognized nearly a century ago, "[t]he right to privacy ceases upon the publication of the facts by the individual, or with his consent." *The Right to Privacy*, 4 Harv. L. Rev. 213, 218 (1890).[12] Any person who seeks to be naturalized as an American citizen knows that the naturalization proceeding is held in open court. He can have no legitimate expectation that the outcome of the proceeding will be kept secret. That he has become an American citizen is no more private than the fact that a lawyer has been sworn in as a member of the bar in open court.

2. *Naturalization Is a Matter of Public Record.*

The public character of naturalized citizenship is evidenced not only by the requirement that every naturalization proceeding be held in open court, but also by the

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[12] *See, e.g., Berg* v. *Minneapolis Star & Tribune Co.*, 79 F. Supp. 957, 961 (D. Minn. 1948) (plaintiff's privacy was not invaded by publication of facts which plaintiff himself "had made public . . . and had . . . spread on the public records of a court of his choosing").

requirement that every court order granting a naturalization petition be preserved as a matter of public record. It is undisputed that the fact of naturalization is a matter of public record. The Naturalization Act of 1906 provides that "every final order which may be made upon [a naturalization] petition shall be under the hand of the court and entered in full upon a record kept for that purpose . . . ." 8 U.S.C. § 1447(a) (1976). The Act also directs the clerk of "each and every naturalization court" to file "in chronological order in separate volumes, indexed, consecutively numbered, and made a part of the record of such court, all . . . petitions for naturalization." 8 U.S.C. § 1450(e) (1976). As the House floor leader of the bill that became the Naturalization Act of 1906 explained, "[w]e have elaborate provisions in the bill for keeping all records in such proceedings, . . . so that there shall be a complete record in every court of all aliens naturalized by that court . . . ." 40 Cong. Rec. 3646 (1906) (remarks of Rep. Bonynge). These records are available for public inspection.[13]

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[13] To confirm that naturalization records are available for public inspection, counsel for respondent instructed a research assistant to examine the records available to the public in the United States District Court for the District of Columbia. The examination showed that "[f]or each person naturalized in the District of Columbia, there is available for public inspection an index card indicating the number of the individual's Petition for Naturalization and the date that petition was granted." *See* Affidavit of Paul DeWolfe. (J.A. 29) The index cards are arranged alphabetically by the name of the citizen. *Ibid.* Any members of the public can also inspect the actual petitions for naturalization, which are "maintained in books arranged by the identifying number of the Petition." *Ibid.*

Respondent's research assistant also questioned clerks employed in the United States District Court for the Southern District of New York, the United States District Court for the Eastern District of Virginia, and the United States District Court for the District of Maryland. Each clerk confirmed that naturalization records are open for public inspection. (J.A. 30)

When a naturalized citizen either voluntarily renounces his citizenship or becomes expatriated in some other way, that too becomes

There can be no reasonable and legitimate expectation of privacy with respect to facts that are a matter of public record. The common law action for invasion of privacy provides an instructive analogy.[14] The *Restatement (Second) of Torts* states:

> "There is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of his birth, the fact of his marriage, his military record, the fact that he is admitted to the practice of medicine or is licensed to drive a taxicab, or the pleadings that he has filed in a lawsuit."

Restatement (Second) of Torts, § 652D, Comment b (1977). This principle is reflected in a wide range of decisions. For example, it is not an invasion of privacy

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a matter of official court record available for public inspection. When a naturalized citizen loses his nationality, the Department of State issues a certificate of loss of nationality, 22 C.F.R. §§ 50.41, 50.50 (1980), or a certificate of expatriation, 22 C.F.R. § 50.51 (1980). By regulation, the Department of State is required to provide these Certificates to the Immigration and Naturalization Service ("INS"). 22 C.F.R. §§ 50.41(d), 50.50(b). Pursuant to its Operating Instructions, the INS, in turn, is required to notify the clerk of the naturalization court of the individual's loss of nationality. *See* INS Operating Instructions, § 349.1. (J.A. 32)

The INS notifies the clerk of the naturalization court by forwarding to the court CO Form 52. (J.A. 33) That form states in pertinent part:

> "This office is in possession of information showing that the person named below has lost United States citizenship since the date of naturalization.
>
> *Please place this communication with the record of the naturalization, and note your index accordingly.*"

(Emphasis supplied.)

[14] Although the privacy interest protected by the FOIA may not be identical to that protected by tort law, "the right of privacy in both instances exists primarily for the purpose of preventing or redressing the mental distress resulting from the public exposure of intimate and embarrassing personal details about the private life of an individual." *Tennessean Newspaper, Inc.* v. *Levi*, 403 F. Supp. 1318, 1321 n.1 (M.D. Tenn. 1975).

to publicize the fact that a 12-year-old mother has given birth to a child, since "it was an event which the law required to be entered as a public record." *Meetze* v. *Associated Press*, 230 S.C. 330, 95 S.E.2d 606, 610 (1956). Similarly, an individual's privacy is not invaded by a publication describing an invention for which he obtained a patent, since a patent application filed with the United States Patent Office itself describes the invention. *Thompson* v. *Curtis Publishing Co.*, 193 F.2d 953 (3d Cir. 1952). *See generally Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 494-95 (1975) ("the interests in privacy fade when the information involved already appears on the public record").[15]

Given the established principle that publication of facts in the public record will not support a tort action for invasion of privacy, it is not surprising that Exemption 6 has been held inapplicable to such matters of public record as a criminal conviction, *Ferri* v. *Bell*, Civil No. 78-841 (M.D. Pa., Aug. 20, 1979) at 7, *reversed and remanded on other grounds and as to other records*,[16] 645

[15] Other cases applying this principle include *Hubbard* v. *Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (1962) (article based on juvenile court records charging 16-year-old boy with sexually assaulting his sister); *Frith* v. *Associated Press*, 176 F. Supp. 671, 674 (E.D.S.C. 1959) (publication of pictures of robbery suspects was not an invasion of privacy because pictures constituted "an official record made public by the Governor of South Carolina, and his highest law enforcement officials"); and *Langford* v. *Vanderbilt University*, 199 Tenn. 389, 287 S.W.2d 32, 39 (1956) (publication of contents of pleading is not actionable because it is not an invasion of a person's privacy to "publish[] a matter which that individual has already made a matter of public record available to the eyes, ears and curiosity of all who care to look, listen or read"). *Cf. Lamont* v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.) (disclosure of motor vehicle registration record is not an unconstitutional invasion of privacy because information is "not vital or intimate" and is "in the category of 'public records,' available to anyone upon demand"), *aff'd per curiam*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968).

[16] The Government did not appeal the district court's decision in *Ferri* that criminal records do not satisfy the threshold test for withholding under Exemption 6.

F.2d 1213 (3d Cir. 1981), *vacated*, No. 79-2414 (3d Cir., Oct. 23, 1981), a public official's appointment status and salary, *Information Acquisition Corp.* v. *Department of Justice*, 444 F. Supp. 458, 464 (D.D.C. 1978) (alternative holding), and a campaign contribution which must be reported under the Federal Corrupt Practices Act, *Congressional News Syndicate* v. *United States Department of Justice*, 438 F. Supp. 538, 543 (D.D.C. 1977).[17]

To be sure, respondent seeks access to State Department records, not court records. But information that is not private because it is a matter of public record does not somehow become private when it is also included in

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[17] It is true that in *Simpson* v. *Vance*, 648 F.2d 10 (D.C. Cir. 1980), the District of Columbia Circuit held that Exemption 6 does apply to information indicating whether a person is married and, if so, the identity of his or her spouse. *Id.* at 17. *See also Rural Housing Alliance* v. *U.S. Dept. of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974) (record containing "information regarding marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, reputation, and so on, . . . involves sufficiently intimate details to be a 'similar' file under exemption 6"). But that decision does not support the Government's position here. First of all, the plaintiff in *Simpson* did not argue in his briefs on appeal that information concerning marital status is a matter of public record, *see* Brief for Appellant; Reply Brief, and the court did not consider the point in its opinion. Second, although, as the Government points out, marital status is "usually ascertainable . . . from public records" (Br. Pet. 31), this is not true of common law marriage, and even where a marriage license is obtained, marital status differs substantially from naturalization in that there is no systematic nationwide procedure for recording such information *and* correcting the records when a change in status occurs. *See* pages 26-27 and note 13 *supra*. Third, there is no legal requirement that a marriage ceremony be held in public, whereas Congress has provided that all naturalization proceedings must be conducted in open court. Finally, and perhaps most importantly, marriage is a personal relationship to which a time-honored tradition of privacy attaches, *see, e.g., Griswold* v. *Connecticut*, 381 U.S. 479 (1965), whereas citizenship is a status of public significance to which no legitimate expectation of privacy attaches. *See* pages 31-33 *infra*.

a State Department file. Information is either private or it is not. The content of the information is the same regardless of the records in which it is contained. If the fact that a person has been naturalized as an American citizen is public information because it is a matter of public record, that fact remains public when it is recorded in a document that is not in the public record.[18]

3. *Citizenship Is a Public Status.*

Even if naturalization proceedings were not held in open court and naturalization information were not a matter of public record, citizenship would still be a public fact, for the fundamental reason that citizenship, by its very nature, is a public status. Citizenship does not concern the personal aspects of an individual's life. It does not concern his relationship with his family, the activities he conducts in his home, or his intimate beliefs, practices, and values. Rather, it defines his relationship with the government and with the entire political community. It is no more private than a lawyer's membership in the bar or a serviceman's induction into the armed forces.

The public character of citizenship has long been recognized. As this Court declared in *United States* v. *Schwimmer*, 279 U.S. 644, 649 (1929), all citizens "owe allegiance to the Government, and the Government owes to them the duty of protection." [19] More recently, in *Ambach*

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[18] *See, e.g., Meetze* v. *Associated Press*, 95 S.E.2d at 610 (disclosure that 12-year-old girl gave birth is not an invasion of privacy since births are a matter of public record, even though information was not obtained from public record).

Of course, access to naturalization information is difficult because the records are scattered throughout courts across the entire country. Information is not private, however, simply because it is difficult to locate.

[19] *Cf. Luria* v. *United States*, 231 U.S. 9, 22 (1913) ("Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society.").

v. *Norwick*, 441 U.S. 68, 75 (1979), the Court observed that "[t]he distinction between citizens and aliens . . . is fundamental to the definition and government of a State." [20] "A new citizen has become a member of a Nation, part of a people distinct from others. . . . The individual, at that point, belongs to the polity and is entitled to participate in the processes of democratic decision-making." *Foley* v. *Connelie*, 435 U.S. 291, 295 (1978).

The public significance of citizenship is evidenced by the civic rights and privileges that only citizens may exercise. For example, only citizens participate in the process of electing public officials.[21] The Constitution itself makes citizenship a prerequisite for election as President,[22] Senator,[23] and Representative.[24] And this Court has held that, notwithstanding the general prohibition of discrimination against aliens,[25] states may exclude aliens from such important governmental functions as jury service,[26] law enforcement,[27] and instruction in the public schools.[28]

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[20] *Cf. Afroyim* v. *Rusk*, 387 U.S. 253, 268 (1967) ("Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenship.")

[21] *See* A. Reitman, R. Davidson, *The Election Process: Voting Laws and Procedures* 8-9 (1972) (all 50 states limit the franchise to citizens). *See also Skafte* v. *Rorex*, 430 U.S. 961 (1977), *dismissing appeal from* 191 Colo. 399, 553 P.2d 830 (1976).

[22] U.S. Const. Art. II, § 1, Cl.5.

[23] *Id.* Art. I, § 3, Cl.3.

[24] *Id.* Art. I, § 2, Cl.2.

[25] *See, e.g., Nyquist* v. *Mauclet*, 432 U.S. 1 (1977); *Graham* v. *Richardson*, 403 U.S. 365 (1971).

[26] *Perkins* v. *Smith*, 426 U.S. 913 (1976), *aff'g mem.*, 370 F. Supp. 134 (D. Md. 1974).

[27] *Cabell* v. *Chavez-Salido*, 50 U.S.L.W. 4095 (U.S. Jan. 12, 1982) (No. 80-990); *Foley* v. *Connelie*, 435 U.S. 291 (1978).

[28] *Ambach* v. *Norwick*, 441 U.S. 68 (1979).

That citizenship is a public status is also evidenced by the fact that it can be conferred only by the government. The naturalization of a citizen is an official governmental act. The status which that official act confers is not a private matter. *Cf. Paul* v. *Davis*, 424 U.S. 693, 713 (1976) (rejecting claim that it is an unconstitutional invasion of privacy to "publicize a record of an official act such as an arrest").

The public nature of citizenship is vividly reflected in the oath of allegiance that the law requires every applicant for citizenship to take. *See* 8 U.S.C. § 1448(a) (1976). The oath reads as follows:

> "I hereby declare, on oath, that I absolutely and entirely renounce and adjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the armed forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God."

8 C.F.R. § 337.1 (1981). None of the obligations that the applicant assumes concern his personal life. Each of the solemn obligations he assumes are owed to the government and to his fellow citizens. Citizenship is a public status because these are obligations that concern the new citizen's role in the government and in the community.[29]

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[29] Even if it could be said that some slight invasion of privacy might result from the disclosure of the citizenship of a person who has in no way entered public life, clearly no invasion of privacy

B. Even Assuming That Some Conceivable Privacy Interest Attaches to Citizenship, It Is Not Similar to the Privacy Interest Implicated by Personnel and Medical Files.

Even assuming that some minimal privacy interest attaches to citizenship, that interest is plainly not of the same character as the privacy interest that attaches to personnel and medical files. Whether a person is a naturalized American citizen is neither an "intimate detail," H. Rep. No. 1497 at 11, nor "highly personal" information, S. Rep. No. 813 at 9. Given the acutely private nature of information in personnel and medical files, and the strikingly public attributes of naturalized citizenship—the requirement that naturalization proceedings be held in open court, the fact that naturalization is always a matter of public record, and the public significance of citizenship—the conclusion is ineluctable that a record indicating that a person is a naturalized citizen does not "implicate[] similar privacy values . . . ." *Department of the Air Force* v. *Rose*, 425 U.S. at 376. If the word "similar" in Exemption 6 means anything, it surely means that the exemption does not include information as demonstrably public as information indicating whether a person is a citizen of the United States.[30]

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can result from the disclosure of the citizenship of prominent political figures such as Yazdi and Behzadnia. *See, e.g., Tennessean Newspaper, Inc.* v. *Levi*, 403 F. Supp. 1318, 1321 n.1 (M.D. Tenn. 1975) (public personage doctrine that has developed in common law cases involving the right of privacy is relevant in FOIA cases).

[30] The Government's assertion that disclosure of the records at issue would constitute an invasion of privacy is particularly feeble as far as Yazdi is concerned. Yazdi's American citizenship has been disclosed in books published by present and former Government officials "in a position to know" whether he is a citizen, *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975). *See* J. Stempel, *Inside the Iranian Revolution* 166 (Ind. Univ. Press 1981) (Mem. App. D, 9a); W. Sullivan, *Mission to Iran* (W.W. Norton & Co. 1981) (Mem.

CONCLUSION

Whatever the precise scope of Exemption 6 is, that exemption can in no event embrace an agency record disclosing the fact that a person is a naturalized American citizen. Citizenship simply is not a private fact.

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 1982

App. E, 10a). Yazdi has also apparently disclaimed any desire to prevent release of State Department records concerning his citizenship. *See Iran Times*, Dec. 4, 1981, p. 1 (Mem. App. F, 11a).

With respect to Behzadnia, even if the Government were correct in asserting that disclosure of his citizenship would be an invasion of privacy, disclosure would not be clearly unwarranted since Behzadnia is apparently now living in the United States. *See Iran Times*, Nov. 13, 1981, p. 1 (Mem. App. C, 6a-8a). Assistant Secretary Saunders' affidavits address only the situation faced by Iranian officials living in Iran. (J.A. 17, 41)

Petitioner's Reply Brief

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Supreme Court, U.S.
FILED
MAR 23 1982
ALEXANDER L. STEVAS
CLERK

No. 81-535

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES DEPARTMENT OF STATE, ET AL.,
PETITIONERS

v.

THE WASHINGTON POST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondent's brief attempts to obscure the issue before this Court at every turn. The sole question for review in this case is whether State Department records that would reveal whether two named Iranian nationals are United States citizens are "similar files" within the meaning of Exemption 6 of the Freedom of Information Act, 5 U.S.C. 552(b)(6).[1] If such records qualify as "similar files," then

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[1]The court of appeals also appears to have ordered disclosure of records revealing whether certain individuals possess a United States passport, although such records were not included in respondent's outstanding request.

Respondent's original FOIA request was for "documents indicating whether Dr. Ali Behzadnia and Dr. Ibrahim Yazdi * * * hold valid U.S. passports," but respondent subsequently indicated that it would accept "any record held by the Passport Office indicating whether either of these persons is an American citizen" (J.A. 8). The district court's

they must be scrutinized under an additional Exemption 6 criterion—namely, whether their disclosure "would constitute a clearly unwarranted invasion of personal privacy"—to determine whether the Department may properly withhold them from public disclosure. This second criterion—which is not at issue in this Court—involves a balancing of the seriousness of the particular personal privacy invasion against the public interest in disclosure. *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372-373 (1976).

Respondent's repeated emphasis on the minimal privacy value attached to naturalization records obscures the fact that only the threshold "similar files" issue is before the Court in this case and that the government is *not* asking this Court to hold that the records respondent has requested are

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order applied to citizenship information (Pet. App. 12a-13a), and the briefs of the parties in the court of appeals focused on that subject. Nonetheless, in its court of appeals brief the government formulated the issue as "[w]hether the District Court erred in holding that the requested information, which would reveal whether two Iranians now living in Iran hold valid U.S. passports or are citizens of this country, is not exempt from disclosure" under Exemption 6 of the FOIA (Pet. C.A. Br. 1). Although respondent framed the issue solely in terms of citizenship information (Resp. C.A. Br. 1, 3), its Statement of the Case described the FOIA request as a request for "any records indicating whether two individuals are citizens of the United States and hold valid passports" (*id.* at 3).

The court of appeals obviously assumed that the case involved questions respecting both naturalization information and information indicating passport possession, because it defined the records at issue as "records that would indicate whether two individuals now residing in Iran are U.S. citizens or hold U.S. passports" (Pet. App. 2a) and concluded that "facts of current citizenship or possession of a United States passport" are not sufficiently intimate to meet the District of Columbia Circuit's "similar files" test (*id.* at 3a). Although, for the reasons stated above, this assumption was incorrect, our arguments concerning naturalization information would necessarily cover release of similar information in passport records.

exempt from disclosure. The court of appeals concluded that, because of the nature of the general category of information involved, the records were not "similar files," and it accordingly ordered public disclosure without applying the balancing test. The government's position is simply that the court below erred in ordering release of the documents without engaging in the balancing required by Congress, and we merely seek a remand for that purpose.

Similarly, respondent urges this Court to affirm the judgment below on the ground that citizenship is "a public fact, not a private fact" (Br. 6)[2] and that any record indicating that a person is a naturalized American citizen "does not implicate any legitimate expectation of personal privacy" (*ibid.*). By emphasizing this aspect of the case, respondent again attempts to divert the Court's attention from the sole issue presented—the meaning of the term "similar files"—and to persuade the Court to engage in precisely the kind of balancing process that the court of appeals expressly declined to undertake. For this reason, the examples respondent offers in an effort to show the unreasonableness of the government's position are beside the point. See, *e.g.*, Resp. Br. 26-33. Many of the records to which respondent refers would not be exempt—but because they would fail the balancing test of Exemption 6, not because they do not qualify as "similar files."

Moreover, by asserting (Br. 11) that the balancing test under Exemption 6 only involves a determination of

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[2]As we observed in our opening brief (Br. 31), the District of Columbia Circuit has held that records reflecting marital status are "similar files," despite the fact that marriage is an official status conferred by the state and that such information is obtainable, in most instances, from public records. Respondent's attempts (Br. 30 n.17) to distinguish this line of cases is unpersuasive. The aspects of marriage to which a "time-honored tradition of privacy attaches" certainly do not extend to the mere fact that someone is married.

whether disclosure is "clearly unwarranted," respondent erroneously suggests (Br. 11-12) that the weighing of the personal privacy interest in the information at issue must be imported into the threshold "similar files" inquiry. This truncation of the balancing test into a "clearly unwarranted" formulation also underlies respondent's contention (Br. 12-13) that our construction of Exemption 6 would result in permitting the withholding of records pertaining to any individual whenever there is "good cause found"—the standard under Section 3 of the old Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1002. Respondent's claim is plainly incorrect. Our construction of Exemption 6 in no way resurrects the old "good cause" disclosure standard, because we fully acknowledge that records may not be withheld unless the government bears its burden of showing that their disclosure would result in an "invasion of personal privacy" so serious as to outweigh any public interest in disclosure. We submit simply that the court below erred in holding that information pertaining to a particular individual may be denied Exemption 6 consideration on the ground that information of that type may, *in the usual case*, be revealed with no harm to the privacy interests of the individual concerned. Respondent's emphasis on the public character of naturalization proceedings (Br. 24-33)[3] merely reflects the erroneous holding of the court of appeals that if information about a particular person is not *generically* of a highly intimate character, then the government must disclose it regardless of the magnitude of the personal privacy

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[3]With the exception of a portion of one footnote (Resp. Br. 27-28 n.13), respondent focuses almost exclusively on the question whether either Dr. Yazdi or Dr. Behzadnia was ever naturalized, although its request is for information on their current citizenship status. As we explained in our opening brief, respondent's FOIA request is a demand for information concerning continued adherence to a citizenship choice either man may have made (Pet. Br. 30), and it raises the possibility of disclosure of the presence or absence of records relating to expatriation

interests that would be sacrificed through its disclosure in the particular case.[4]

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proceedings, which are customarily private, at least until the Department of State finds it appropriate to transmit a certificate of expatriation to the Immigration and Naturalization Service (Pet. Br. 33-34 n.19, 34 n.20).

We also note in this regard that respondent makes no mention of passport information, which is not a matter of public record and which may contain a great many "intimate" details (see Pet. Br. 28 n.11). Respondent's silence may simply reflect the fact that, despite the loose language in the court of appeals' opinion (Pet. App. 2a), respondent's FOIA request did not encompass, and the district court did not order the release of, passport records. See note 1, *supra*.

[4]In our opening brief we relied (Br. 32-33 n.18) on remarks in an article on Exemption 6, Kronman, *The Privacy Exemption to the Freedom of Information Act*, IX J. Legal Studies 727 (1980) [hereinafter "*Privacy Exemption*"], to support the proposition that the concept of "highly intimate" information embraces only facts of a kind that most people would regard as highly embarrassing and be reluctant to have revealed about themselves, and that use of that concept as an Exemption 6 screening device would therefore exclude information that was highly embarrassing to a particular individual, even though not generally regarded as embarrassing or sensitive. This proposition is relevant to our contention (Br. 30-31) that the imposition of a *threshold* intimate details test would frustrate the congressional intent to permit the government to withhold records "the disclosure of which might harm the individual." H.R. Rep.No. 1497, 89th Cong., 2d Sess. 11 (1966). Respondent contends (Br. 22-23) that the "thrust" of the quoted passage in Professor Kronman's article is the opposite of what we suggest and that the article actually supports respondent's view of Exemption 6.

We disagree. It is true that Professor Kronman asserts (~~IX J. Legal Studies~~ at 752) that the common assumptions regarding "a domain of 'intimate' facts and the accompanying belief that personal privacy has a discernable core" reflect assumptions concerning the types of facts that people would most likely wish to conceal about themselves; and he is critical (*id.* at 750-752) of cases in which courts have permitted withholding of *lists* of names on the basis of speculation that in a few instances the disclosure might be embarrassing to someone. But Professor Kronman does not argue that when an FOIA request concerns information that is not generically intimate, the "similar files" criterion of Exemption 6 bars judicial scrutiny of an agency's proffer of evidence

2. In our opening brief (Br. 15-24) we discussed both the legislative history of Exemption 6 and this Court's elucidation, in *Department of the Air Force* v. *Rose*, *supra*, of the structure and significance of that exemption in light of its legislative history. In particular, we noted that the Court in *Rose* agreed (425 U.S. at 371) with the propositions that the legislative history of Exemption 6 indicates that it is the " 'identifying connection to the individual that casts the personnel, medical and similar files within the protection of [the] sixth exemption' " and that the " 'key words' " in setting the limits to the exemption are the phrase " 'a clearly unwarranted invasion of personal privacy.' " Respondent's reliance (Br. 14-15) on sentences from the legislative reports referring to "intimate details" and "highly personal" information do not refute this basic point concerning the structure of Exemption 6, nor do they prove that Congress wished to exclude from the exemption information that is highly personal to a particular individual, although of a character that in most circumstances could be readily revealed about a person without intruding into personally sensitive matters. These case-specific determinations were to be made in the context of applying the balancing part of the exemption, not the "similar files" threshold part.

We also note that respondent fails to reckon at all with Congress' own explanation of the term "similar" in Exemption 6, an explanation which confirms our view that the intimacy considerations emphasized by respondent are not included in the threshold test. In commenting on the

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that disclosure will constitute an unwarranted intrusion into the personal privacy of a particular person in the particular circumstances of the case. Indeed, he states (*id.* at 739; footnotes omitted) that "[t]he first interest protected by the exemption (and judging from the legislative history of the act, the one its draftsmen had most clearly in mind) is the interest individuals have in concealing—or more neutrally, in retaining the power to selectively disclose—embarrassing facts about themselves".

amendments to S. 1666 that added the predecessor version of Exemption 6, the Senate Report explained (S. Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964) that the amendment included a reference to "similar" records, following the reference to "personnel and medical files," because it would be "impossible to name" every type of record to which the exemption should apply. As we explained in our opening brief (Br. 16 n.3), the Senate had previously heard testimony from a Justice Department official indicating that the government possessed large volumes of records containing "personal information," the disclosure of which could pose "an infinite number of possibilities of injury to innocent individuals" and warning against any "simple solution" for determining what should be disclosed. *Freedom of Information: Hearings on S. 1666 and S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 199 (1963) (testimony of Assistant Attorney General Norbert A. Schlei). Contrary to respondent's assertions, it is foolish to believe that Congress disregarded that admonition by structuring a wholly inadequate "personal privacy" exemption--one that, by erecting artificial distinctions, fails to protect vast quantities of government documents containing personal information from public disclosure that would seriously injure the people involved.[5]

Indeed, it is worth noting in this regard that respondent's brief fails to discuss, much less explain, a serious infirmity in the court of appeals' "intimate details" test, which we mentioned in our opening brief (Br. 28-29). Under that test, information that pertains to an individual but that is not

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[5]The legislative history also refutes respondent's remarkable assertion (Br. 23) that the possibility that release of personal information from government files might lead to physical harm to the individual involved is irrelevant to the interests protected by Exemption 6. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

generically "intimate" would be eligible for withholding if located in a personnel or medical file, *but would have to be released to the public if located in some other kind of government file*. While respondent asserts (Br. 31) that "[i]nformation is either private [*i.e.*, protected] or it is not" and that "[t]he content of the information is the same regardless of the records in which it is contained," this presumption of uniform treatment for particular types of information is flatly inconsistent with the court of appeals' "intimate details" test and the dubious assumption on which it rests.

3. Respondent refers the Court (Br. 34-35 n.30) to various extra-record publications alleging that Dr. Yazdi became a naturalized United States citizen and that Dr. Behzadnia is at present living in Michigan. As we explained in our Opposition to Respondent's Memorandum Suggesting that the Writ Be Dismissed as Improvidently Granted, the reported allegations are totally irrelevant to the issue before the Court.[6] However, because respondent asserts (Br. 35 n.30), on the basis of one of these publications, that "Yazdi has * * * apparently disclaimed any desire to prevent release of State Department records concerning his citizenship," we consider it appropriate to advise the Court that an article published last month by respondent reports that Dr. Yazdi "remain[s] in Iran but under house arrest." "U.S. Turned to Iran's Moderates," *The Washington Post*, Feb. 6, 1982, at A12, col. 1. It is unlikely that second-hand or third-hand reports concerning Dr. Yazdi's wishes in regard to release of information about him can be depended upon to represent his actual views in the matter.[7]

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[6]On February 22, 1982, the Court denied respondent's suggestion that the writ of certiorari be dismissed as improvidently granted.

[7]In our opening brief (Br. 25 n.9), we advised the Court that the Third Circuit had granted the government's petition for rehearing and vacated its opinion in *Ferri* v. *Bell*, 645 F. 2d 1213 (1981), an opinion which

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1982

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had cited with approval the court of appeals' decision in this case. After considering briefs on rehearing, the Third Circuit has now reinstated its earlier opinion with a supplemental memorandum that preserves the government's ability, on remand for consideration of the arrest record at issue under Exemption 7(C) of the FOIA, to submit affidavits to rebut the requester's assertions that the public interest in disclosure outweighs the personal privacy interest of the subject of the record. The government had argued in its rehearing brief to the panel that Exemption 6, as well as Exemption 7, applies to arrest records but that, in any event, the panel's comments on Exemption 6 in the original opinion were unnecessary in light of its treatment of the record under Exemption 7(C).

Respondent's reference (Br. 29 n.16) to the government's failure to take an appeal from the district court decision in *Ferri* refers to the government's decision not to appeal the district court's holding that the *conviction* records at issue in that case would not be withheld under the FOIA. The appellate case was generated by the requester's appeal from the district court's refusal to order disclosure of certain *arrest* information, a decision that the government defended on appeal by reliance on several exemptions, including Exemption 6.

Motion to Dismiss

Office - Supreme Court, U.S.
FILED
JAN 20 1982
ALEXANDER L. STEVAS.
CLERK

No. 81-535

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES DEPARTMENT OF STATE, *et al.*,
Petitioners,

v.

THE WASHINGTON POST COMPANY,
Respondent.

MEMORANDUM OF RESPONDENT SUGGESTING THAT THE WRIT OF CERTIORARI BE DISMISSED AS IMPROVIDENTLY GRANTED

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v.

THE WASHINGTON POST COMPANY,
Respondent.

MEMORANDUM OF RESPONDENT SUGGESTING THAT THE WRIT OF CERTIORARI BE DISMISSED AS IMPROVIDENTLY GRANTED

The Washington Post Company, the respondent in the above-captioned case,[1] files this memorandum to advise the Court of certain facts which have come to respondent's attention since the writ of certiorari was granted on November 9, 1981.[2] In light of these facts, respondent requests that the Court "consider[ ] anew whether this case is one in which 'there are special and important reasons' for granting the writ of certiorari." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73 (1955) (*quoting* then Supreme Court Rule 19). Respondent respectfully suggests that the writ should be dismissed as improvidently granted.

[1] Pursuant to Supreme Court Rule 28.1, respondent's subsidiaries are listed on page ii of respondent's Brief in Opposition to Petition for a Writ of Certiorari.

[2] Counsel for respondent has previously informed counsel for petitioners of these additional facts in a telephone conversation on December 31, 1981, and in a letter dated January 6, 1982. (App. A, *infra*, 1a-2a) By letter dated January 14, 1982, counsel for petitioners stated that, after consideration of these new developments, the State Department "has not changed its position on your FOIA request." (App. B, *infra*, 3a-5a)

This case concerns respondent's request under the Freedom of Information Act for State Department records indicating whether two officials in the Iranian government, Dr. Ali Behzadnia and Dr. Ibrahim Yazdi, were naturalized as American citizens, and if so, whether they still are American citizens. (J.A. 8-9)[3] The State Department has refused to produce the records on the ground that they fall within Exemption 6 of the Act, which encompasses "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). (J.A. 14, 22-23) The State Department asserts (1) that the records are "similar files" within the ambit of Exemption 6 and (2) that disclosure of the records would constitute "a clearly unwarranted invasion of personal privacy," because it would subject Dr. Behzadnia and Dr. Yazdi to the threat of physical harm at the hands of Iranians who are hostile to Americans.

The State Department's contention that disclosure of the records would constitute "a clearly unwarranted invasion of personal privacy" rests entirely on two affidavits of former Assistant Secretary of State Harold H. Saunders, dated January 14, 1980, and April 22, 1980. (J.A. 16-18, 40-41) The affidavits assert that release of the records would subject Dr. Behzadnia and Dr. Yazdi to the threat of physical harm. Assistant Secretary Saunders stated that there is "intense anti-American sentiment in Iran," that "several Iranian revolutionary leaders have been strongly criticized in the press for their alleged ties to the United States," and that "[a]ny individual in Iran who is suspected of being an American citizen or of having American connections is looked upon with mistrust." (J.A. 17) Saunders concluded: "An official of the Government of Iran who is reputed to be an American citizen would, in my opinion, be in physical

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[3] References to the Joint Appendix filed in this Court are indicated by "J.A." followed by the appropriate page number.

danger from some of the revolutionary groups that are prone to violence." (J.A. 17)

Petitioners have asked this Court to reverse the court of appeals' decision that the records are not "similar files." Petitioners seek a decision by this Court of the following question:

> "Whether State Department records that would reveal whether two Iranian nationals are naturalized American citizens holding valid United States passports are 'similar files' within the meaning of Exemption 6 of the Freedom of Information Act and are thus eligible for withholding on the ground that public disclosure would constitute a clearly unwarranted invasion of personal privacy."

Petition for a Writ of Certiorari at (I); Brief for the Petitioners at (I). Petitioners urge this Court to hold that the records are "similar files" and to remand "so that the court of appeals may engage in the balancing of public and private interests mandated by Exemption 6." Brief for the Petitioners at 37.

Facts which have come to respondent's attention since the writ of certiorari was granted on November 9, 1981, strongly suggest that resolution of the "similar files" issue is no longer necessary to decide this case. Recent disclosures concerning Dr. Behzadnia and Dr. Yazdi indicate that, even if records showing that an individual is an American citizen constitute "similar files," Exemption 6 no longer provides any support for the State Department's refusal to produce the records at issue here.

On November 13, 1981, the *Iran Times* reported that Dr. Behzadnia is now living in Michigan, and that it had spoken to him at his home there. (App. C, *infra*, 6a-8a) By their own terms, Assistant Secretary Saunders' affidavits concern only Iranian officials living in Iran. (J.A. 17) The affidavits do not assert that an Iranian official living in the United States would face physical danger if it were suspected that he is an American citizen. Regardless of the proper interpretation of

the term "similar files," respondent is thus entitled to State Department records indicating whether Dr. Behzadnia is an American citizen.

Recent disclosures concerning Dr. Yazdi likewise indicate that Exemption 6 does not permit the State Department to withhold records confirming his citizenship even if the records are "similar files." In *Inside the Iranian Revolution*, published by Indiana University Press on November 4, 1981, the Director of the State Department Operations Center, John D. Stempel, states that "Yazdi never renounced his naturalization in 1962 and even today is an American citizen." *Id.* at 166. (App. D, *infra*, 9a) Mr. Stempel's disclosure has recently been confirmed by William H. Sullivan, former United States Ambassador to Iran. In *Mission to Iran*, published by W.W. Norton & Company on November 23, 1981, former Ambassador Sullivan describes Dr. Yazdi as "an Iranian immigrant to the United States who had lived many years in Houston, Texas, and acquired United States nationality." *Id.* at 200. (App. E, *infra*, 10a) Although these books of course are not official Government publications, both Mr. Stempel and Mr. Sullivan are "in a position to know" whether Dr. Yazdi is a citizen. *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975). It is also noteworthy that on December 4, 1981, the *Iran Times* reported as follows:

> "The government news agency Pars said Yazdi, a former foreign minister and now a Majlis deputy, wrote Majlis Speaker Hagheml Raisanjani asking him to tell the Foreign Ministry to tell the American government it was free to release documents related to his citizenship."

(App. F, *infra*, 11a).

The recent information concerning Dr. Yazdi's citizenship already in the public domain as a result of the books published by Director Stempel and former Ambassador Sullivan, coupled with Dr. Yazdi's apparent willingness

to have his records released, undermines the State Department's continuing contention that release of the records would invade Dr. Yazdi's privacy. Even if the Government were correct in asserting that American citizenship is a private fact and that documents recording that fact are therefore eligible for withholding under Exemption 6, any privacy interest has been vitiated here, if not altogether eliminated, by statements of past and present American officials that Yazdi was naturalized as an American citizen and by Yazdi's apparent disavowal of any interest in preventing release of records concerning his citizenship. *Cf. Department of the Air Force* v. *Rose*, 425 U.S. 352, 380 n.19 (1976) ("Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities").[4]

Respondent brings these new facts to the Court's attention because it believes that had they been before the Court when the petition for certiorari was considered, the Court might well have concluded that there are no "special and important reasons" for review on writ of certiorari, as required by Supreme Court Rule 17.1. Because Dr. Behzadnia is evidently now living in Michigan and any conceivable invasion of Dr. Yazdi's privacy would at most be *de minimis*, it now appears that resolution of the "similar files" issue will not be "necessary for decision" of this case. *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961). *Cf. Keller* v. *Adams-Campbell Co., Inc.*, 264 U.S. 314, 319 (1924) (writ of certiorari dismissed as improvidently granted because further examination of record demonstrated that review was not "necessary to reconcile decisions of Circuit Courts of Appeal"); *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959) (writ of certiorari dismissed as improvidently granted because further examination of record demonstrated that it was not necessary to decide "that aspect

[4] These recent statements concerning Dr. Yazdi's citizenship also suggest that release of the records would not subject him to any danger that he does not already face.

of the case, which alone presents the question which led us to grant certiorari"); *Burrell* v. *McCray*, 426 U.S. 471, 473 (1976) (Stevens, J., concurring in dismissal of writ of certiorari as improvidently granted) ("the state of the law applicable to the facts disclosed by this record is sufficiently clear that the dismissal of the writ is a permissible exercise of the Court's discretionary power"). In view of the developments that have occured since the writ of certiorari was granted, review on certiorari would not be "a provident expenditure of the energies of the Court." *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497, 502 (1971) (Harlan, J., concurring in dismissal of writ of certiorari as improvidently granted).

CONCLUSION

For the foregoing reasons, respondent suggests that the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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January 1982

Appendix

APPENDIX A

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January 6, 1982

By Hand

Elinor Hadley Stillman
Assistant to the
Solicitor General
U.S. Department of Justice
Room 5158
Washington, D.C. 20558

Re: *United States Department of State, et al.* v. *The Washington Post Co.*, No. 81-535

Dear Ms. Stillman:

I am writing to confirm our telephone conversation on December 31, 1981, in which I called to your attention the following information that I learned that same day:

(1) In a book entitled, *Inside the Iranian Revolution*, John D. Stempel, Director of the State Department Operations Center, states:

> "Ibrahim Yazdi, deputy prime minister and later foreign minister in the post-revolutionary government, left an American-born wife and four children in Houston, Texas, [to accompany the Ayatollah]. *Yazdi never renounced his naturalization in 1962*

and even today is an American citizen." (166, emphasis supplied.)

(2) In a book entitled *Mission To Iran*, William H. Sullivan, United States Ambassador to Iran from June 1977 to April 1979, states:

"[A] network of the ayatollah's supporters also centered on Mehdi Bazargan, Amir Entezam, and Nasser Minatchi, the leaders of the so called Liberation Front. They too had direct contact with the ayatollah's entourage, primarily through Ibrahim Yazdi, an Iranian immigrant to the United States who had lived many years in Houston, Texas, *and acquired United States nationality.*["] (200, emphasis supplied.)

(3) An article in the *Iran Times*, November 13, 1981, page 1, bearing the headline "U.S. Supreme Court to decide Yazdi case" reports that

"The Iran Times this week reached Behzadnia at his home in Michigan."

As I told you during our conversation, we believe this information should be called to the Court's attention because it bears on whether this case remains an appropriate vehicle for the Court's review.

Very truly yours,

/s/ Lon S. Babby
LON S. BABBY

LSB/dm

APPENDIX B

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

January 14, 1982

Lon S. Babby, Esq.
Williams & Connolly
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Re: No. 81-535, *Department of State* v. *The Washington Post Co.*

Dear Mr. Babby:

I am hereby responding to your letters of December 14, 1981, and January 6, 1982, directed to me as the Assistant assigned by this Office to the above-referenced case. In the December letter you inquired whether there has been a change of circumstances since April 22, 1980, which would deprive the government of any "continuing basis for contending that the information, if disclosed, would place the named individuals in jeopardy, either because of a change in their circumstances or because of a change of circumstances in Iran." In the January letter you confirmed a telephone conversation of December 31, 1981, between us, in which you reported references in two books published by State Department officials (not in their official capacity) to the naturalization status of Dr. Yazdi, one of the subjects of the information request in this case. That letter also noted that in the December 31 telephone call you had discussed an article in the *Iran Times* issue of November 13, 1981, that the newspaper staff had that week "reached Behzadnia at his home in Michigan." (I was under the im-

pression during the December 31 conversation that you were referring to an *Iran Times* article dated December 4, 1981, which merely stated that Dr. Behzadnia was living in Michigan, but I do not dispute your basic account of the conversation.)

This Office has consulted with officials in the Department of State concerning these matters. As we are stating in our brief to the Supreme Court (at page 33 note 18 and page 34), it is still the view of the Department of State that persons residing in Iran could be endangered by official confirmation that they are naturalized American citizens who have maintained that status and who hold valid United States passports. The State Department has no reliable information that Dr. Behzadnia is, at present, be [*sic*] living in Michigan, and it has absolutely no basis for believing that Dr. Yazdi is not living in Iran. The Department also takes the position that, although the publications that you mention may have some relevance to the balancing test under Exemption 6, they are not conclusive on that issue because, among other reasons, those publications are not official statements or records of the Department and could not possibly reveal whether, assuming Dr. Yazdi had been naturalized, he has maintained that citizenship status up to the present time. The Department thus has not changed its position on your FOIA request.

The publications that you mention in your letter are totally irrelevant to the issue before the Supreme Court, *i.e.*, whether passport and naturalization information constitutes "similar files," within the meaning of Exemption 6. The court of appeals refused to reach the balancing test in this case even accepting arguendo the Department's representations concerning possible harm to the individuals. Hence, there would still be matters to litigate on remand if we succeed in the Supreme Court on the issue of the threshold test for Exemption 6 considera-

tion. Of course, the court of appeals could remand the case to the district court for the submission of additional evidence if that seems warranted.

Sincerely yours,

/s/ Elinor Hadley Stillman
ELINOR HADLEY STILLMAN
Assistant to the
Solicitor General

APPENDIX C

[*Iran Times*, Nov. 13, 1981, p. 1]

U.S. SUPREME COURT TO DECIDE YAZDI CASE

WASHINGTON—The U.S. Supreme Court agreed this week to decide whether the United States government must reveal publicly if former Iranian Foreign Minister Ebrahim Yazdi is really an American citizen.

The justices announced Monday that they would settle a dispute in which the Washington Post has sued the State Department under the Freedom of Information Act for citizenship documents on Yazdi and Ali Behzadnia, at one time the man in the Ministry of National Guidance who oversaw the foreign press in Iran.

The Post sought the citizenship documents from the State Department, which refused, saying "Any individual in Iran who is suspected of being an American citizen or of having American connections is looked upon with mistrust."

Behzadnia, however, is actually living in the United States.

Citizenship records are normally, however, a matter of public record in the United States. The Post went to court. A federal district judge agreed with the newspaper as did the U.S. Court of Appeals for the District of Columbia, which said, "While we are sympathetic to the department's reluctance, . . . Congress did not design (the law) to encompass the withholding of information on the basis of the physical security of persons."

The U.S. government appealed that decision to the Supreme Court.

Two years ago the Post carried a story that mentioned in one buried paragraph that Yazdi was a citizen.

The Iran Times spoke to Yazdi's teenage son in Houston, Texas, who said all the members of the family were American. A number of Iranians who knew Yazdi during his almost two decades of life in the United States have also confirmed that he was a citizen.

Yazdi, however, vehemently denounced all the articles that declared him to be American as inspired by his enemies.

A citizen may always renounce his citizenship with a simple declaration signed at an American embassy. All efforts by the Iran Times to learn if Yazdi had renounced his citizenship were rebuffed by the U.S. State Department.

Yazdi was popularly considered a flaming radical after the revolution. In a matter of months, however, revolutionary rhetoric bypassed him. Although not shifting his own positions, he found the political ground shift under him until he was considered a decidedly unrevolutionary westernized liberal by Iran's clerical rulers.

Yazdi was foreign minister when the American hostages were seized November 4, 1979. Four days later, the cabinet of which he was a member was forced from office.

Yazdi is now a Majlis deputy and is believed to be one of the handful of deputies around former Prime Minister Mehdi Bazargan that the ruling clique is preparing to expel from the Majlis.

After Behzadnia left the Ministry of National Guidance, he was named to lead the Red Crescent Society by President Bani-Sadr. Bahzadnia found himself in confrontations with then Prime Minister Mohammad Ali Rajal, who eventually forced him from office.

The Iran Times this week reached Behzadnia at his home in Michigan. His presence in this country appears

to make the State Department's argument about his records moot.

There are two ironies about the case. First, in withholding information that could only be harmful to the pair if they really were citizens, the State Department is effectively confirming their citizenship.

Second, the mere fact that the case has reached the Supreme Court and will be argued in that highly public forum will simply give more ammunition to the opponents of Yazdi and Behzadnia, regardless of the factual outcome.

APPENDIX D

[Excerpt from John D. Stempel, Inside the Iranian Revolution, pp. 165-66 (Ind. Univ. Press, 1981).]

From the moment he arrived on an Air France charter February 1, Khomeini betrayed his vague assurances to Bakhtiar to "behave" and intensified his campaign against the remnants of Pahlavi control. On February 5 the Ayatollah named a provisional government and urged civil servants to refuse to work for anyone but Khomeini's fanatically religious appointees to the various ministries. The Ayatollah's men were everywhere, negotiating with supporters of the Bakhtiar regime and building up their own organization. Several of Khomeini's key lieutenants had arrived with him, including the man who would be elected Iran's first president, Abol Hassan Bani-Sadr; he gave up his economic research in Paris to accompany the Ayatollah. Ibrahim Yazdi, deputy prime minister and later foreign minister in the post-revolutionary government, left an American-born wife and four children in Houston, Texas, to do the same. Yazdi never renounced his naturalization in 1962 and even today is an American citizen.

APPENDIX E

[Excerpt from William H. Sullivan, Mission to Iran, p. 200 (W.W. Norton & Co., 1981).]

In addition to these religious figures, a network of the ayatollah's supporters also centered on Mehdi Bazargan, Amir Entezam, and Nasser Minatchi, the leaders of the so-called Liberation Front. They too had direct contact with the ayatollah's entourage, primarily through Ibrahim Yazdi, an Iranian immigrant to the United States who had lived many years in Houston, Texas, and acquired United States nationality.

APPENDIX F

[Iran Times, Dec. 4, 1981, p. 1.]

YAZDI TO U.S.: FREE MY PAPERS

TEHRAN—Ebrahim Yazdi says he has no objection to the release of official American government documents dealing with his citizenship.

The government news agency Pars said Yazdi, a former foreign minister and now a Majlis deputy, wrote Majlis Speaker Hashemi Raisanjani asking him to tell the Foreign Ministry to tell the American government it was free to release documents related to his citizenship.

The Washington Post has sued the U.S. government demanding the documents on two Iranians—Yazdi and Ali Behzadnia, a former official of the Information Ministry.

The U.S. government refused to turn them over. The case went to the Supreme Court earlier this month.

The U.S. government argued it should not have to give up the documents because to do so could endanger the lives of Yazdi and Behzadnia. However, Behzadnia has since fled Iran and is living in Michigan.

Yazdi launched an attack on the Iran Times two years [*sic*] when it reported that his son had confirmed to the Times that all members of the Yazdi family were American citizens. When the Iran Times sought to find out if Yazdi had renounced his citizenship on returning to Iran, various American authorities turned mum.

Opposition

2

Office - Supreme Court, U.S.
FILED
FEB 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-535

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES DEPARTMENT OF STATE, ET AL.,
PETITIONERS

v.

THE WASHINGTON POST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE PETITIONERS IN OPPOSITION TO RESPONDENT'S SUGGESTION THAT THE WRIT OF CERTIORARI BE DISMISSED AS IMPROVIDENTLY GRANTED

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MEMORANDUM FOR THE PETITIONERS IN OPPOSITION TO RESPONDENT'S SUGGESTION THAT THE WRIT OF CERTIORARI BE DISMISSED AS IMPROVIDENTLY GRANTED

On the basis of various extra-record materials, respondent Washington Post Company has suggested to the Court that the writ of certiorari in this case should be dismissed as improvidently granted. Respondent asserts that those materials would allow it to prevail in this case on a ground that the court of appeals declined to reach. Respondent does not claim—nor could it credibly do so—that the matters it brings to the Court's attention render the case moot, that those matters possess any relevance to the issue on which the Court granted certiorari, or that they diminish the importance of that issue to future litigation under the Freedom of Information Act. For these reasons, and because petitioners do not concede that, on a proper record

in the court below, respondent would prevail on the alternative ground it cites, petitioners submit that respondent's latest attempt to avoid a resolution by this Court of the important Exemption 6 question posed in this case should be rejected.

1. Respondent has requested State Department records that would reveal whether two Iranian nationals are naturalized American citizens holding valid United States passports, and it is entitled under the court of appeals' judgment to be given such records if the Department possesses them. The Department believes that it is entitled to withhold such records under Exemption 6 of the Freedom of Information Act, 5 U.S.C. 552(b)(6), on the ground that they are "similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The court of appeals disagreed, holding that the category of records involved—those revealing naturalization and passport information—are not "similar files" within the meaning of Exemption 6 and are therefore ineligible for balancing consideration under the exemption.

The government sought review of the "similar files" question, and the Court granted certiorari (over objections by respondent quite similar to those presented here; see Br. in Opp. 4 n.4) on November 9, 1981. The "similar files" question is still at issue between the parties, and its importance for future FOIA litigation—its "national significance" (*Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497, 501 (1971) (Harlan, J., concurring))—remains as great today as it was when the petition was granted. Resolution of this important issue, on which the circuits are divided, is totally unaffected by any considerations bearing on the Department's chances of prevailing under the Exemption 6 balancing test—the test that, on the basis of its construction of the "similar files" portion of the exemption, the court below

believed it was unable to reach. As we wrote to the respondent on January 14, 1982 (Resp. Mem. App. 4a):

> The publications that you mention in your letter are totally irrelevant to the issue before the Supreme Court, *i.e.*, whether passport and naturalization information constitutes "similar files," within the meaning of Exemption 6. The court of appeals refused to reach the balancing test in this case even accepting arguendo the Department's representations concerning possible harm to the individuals. Hence, there would still be matters to litigate on remand if we succeed in the Supreme Court on the issue of the threshold test for Exemption 6 consideration. Of course, the court of appeals could remand the case to the district court for the submission of additional evidence if that seems warranted.

2. In any event, given the serious potential consequences of disclosure in this case, the Department does not concede that respondent would prevail on the question whether disclosure of the requested records would constitute a clearly unwarranted invasion of personal privacy, even if the new matters raised in its memorandum were taken into account.[1] At the very outset of this litigation, respondent argued that reported statements by an employee of the Immigration and Naturalization Service concerning the citizenship status of Dr. Ibrahim Yazdi robbed the Department of any credible basis for asserting a privacy interest for

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[1]Respondent is free, of course, to argue that the court of appeals' judgment should be affirmed by this Court on the alternative ground that disclosure of the materials at issue would not constitute a "clearly unwarranted invasion of personal privacy." If it chooses to do so, it would be limited to the record as compiled in the district court, and could not rely on the new matter it now brings to the Court's attention. This highlights the peculiar nature of respondent's current request that the Court dismiss the writ in this case as "improvidently granted."

Dr. Yazdi. Respondent is simply renewing those same arguments now, based on recent publications by present and former Department of State officials, writing in their private capacity, and on statements in the *Iran Times*, a newspaper that—in the very articles cited by respondent—reveals that it has unsuccessfully sought from the Department information concerning the citizenship status of Dr. Yazdi.[2] Now, as at the outset of the litigation, the Department takes the position that reported statements by persons speaking in an unofficial capacity (even State Department employees expressing their private views) concerning the citizenship status of Dr. Yazdi or Dr. Ali Behzadnia are not the equivalent of a disclosure of current official records by the Department.

With respect to other statements in the *Iran Times* articles, we note that the report that Dr. Yazdi has sought to have the Iranian foreign ministry "tell the American government it [is] free to release documents related to his citizenship" (Resp. Mem. App. 11a) is not confirmed by any information known to the Department. It has received no requests on this subject from the Government of Iran and has no knowledge of what the real wishes of Dr. Yazdi may be.[3] Similarly, the Department has no information confirming the report in the *Iran Times* that Dr. Behzadnia is now

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[2]In its article of November 13, 1981, the *Iran Times* reported (Resp. Mem. App. 7a) that "[a]ll efforts by the Iran Times to learn if Yazdi has renounced his citizenship were rebuffed by the U.S. State Department." Similarly, in its article of December 4, 1981, the *Iran Times* stated that when it "sought to find out if Yazdi had renounced his citizenship on returning to Iran, various American authorities turned mum" (*id.* at 11a).

[3]The December 4 article in the *Iran Times* reports that Dr. Yazdi has, in the past, attacked the *Iran Times* for publishing reports concerning his alleged United States citizenship (Resp. Mem. App. 11a), and the November 13 article reports that Dr. Yazdi "vehemently

living in Michigan or that someone on the staff of that newspaper spoke to him there recently. The articles provide no address, and respondent evidently is unable to say where in Michigan Dr. Behzadnia is living, if in fact he is living there.

3. In sum, the publications that respondent brings to the Court's attention do not, as respondent argues, make the "similar files" issue irrelevant to the disposition of this case, nor do they in any way deprive the case of the importance that warranted the Court's grant of the writ of certiorari. The Washington Post Company is understandably satisfied with the restrictive view of the District of Columbia Circuit on the "similar files" question, but petitioners are not. We submit that a determination of that issue is essential not only because it affects the outcome of the present case but also because it will resolve a conflict among the circuits and provide needed guidance to government agencies with respect to future FOIA requests by respondent and others for personal information in agency files.

It is therefore respectfully submitted that the Court should reject respondent's suggestion that the writ of certiorari be dismissed as improvidently granted.

REX E. LEE
Solicitor General

FEBRUARY 1982

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denounced all the articles that declared him to be [an] American as inspired by his enemies" (*id.* at 7a).

It is unclear—and obviously not a matter to be explored in this Court—what channel of communication the *Iran Times*, a newspaper published in Washington, D.C., has with the current Iranian regime and what its attitudes are towards Dr. Behzadnia and Dr. Yazdi.

Amicus Brief

Office - Supreme Court, U.S.
FILED
FEB 8 1982
ALEXANDER L. STEVAS
CLERK

No. 81-535

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DEPARTMENT OF STATE, *et al.*,

Petitioners,

v.

THE WASHINGTON POST COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; THE AMERICAN SOCIETY OF NEWSPAPER EDITORS; THE NATIONAL ASSOCIATION OF BROADCASTERS; THE NATIONAL NEWSPAPER ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AND THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI IN SUPPORT OF RESPONDENT.

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IN THE

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DEPARTMENT OF STATE, *et al.*,

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---

BRIEF *AMICI CURIAE* OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; THE AMERICAN SOCIETY OF NEWSPAPER EDITORS; THE NATIONAL ASSOCIATION OF BROADCASTERS; THE NATIONAL NEWSPAPER ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AND THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI IN SUPPORT OF RESPONDENT.

INTEREST OF AMICI CURIAE

The American Newspaper Publishers Association is a nonprofit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial

portion of the weekly newspaper circulation, in the United States.

The American Society of Newspaper Editors ("ASNE") is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and "the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people."

The National Association of Broadcasters is a trade association consisting of over 5,200 radio and television stations and all the nationwide commercial broadcast networks. Among its primary concerns is maintaining the vitality of the First Amendment guarantee of freedom of the press.

The National Newspaper Association is a trade association consisting of more than 5,500 weekly and daily newspapers located throughout the United States. A major purpose of the Association is to preserve the constitutional guarantee of freedom of the press for community newspapers.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment and freedom of information interests of the press. It has provided representation, information, legal guidance or research in virtually every major press freedoms case that has been litigated since 1970.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of nearly 28,000 members representing every branch and rank of print and broadcast journalism. It is, in fact, the largest, oldest, and most repre-

sentative organization of journalists in the United States. Among the Society's purposes are its commitments to ensure that the public's business be conducted in public and to keep governmental records open to public inspection. Members of the Society regularly prepare news reports based on documents available under the Freedom of Information Act.

If the decision of the court of appeals is not affirmed, the membership of these *amici* will be adversely affected in their ability to report the news.

ARGUMENT

The Government's Construction Of Exemption 6 Empowers It To Withhold Indisputably "Public" Information From Disclosure Under The Freedom Of Information Act

This case invokes the anomalous spectre that uniquely public information, publicly available in courthouses throughout the United States, will be withheld from disclosure under the Freedom of Information Act ("FOIA") because the Department of State has decided that it is somehow "private" information. Such a result cannot be squared with this Court's admonition that "interests in privacy fade when the information involved already appears on the public record." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 495 (1975). *Amici* respectfully submit that such uniquely public information, including an individual's status as a United States citizen, can never be withheld from the public in the name of "privacy."

The FOIA mandates a heavy presumption of disclosure over secrecy. *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). The Act's requirement of liberal disclosure is made plain in 5 U.S.C. § 552(c), which states that the Government is powerless to "authorize withholding of information or limit the availability of records to the public, except as specifically stated." The FOIA contains only nine "clearly delineated" exemptions, S.Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), which "must

be narrowly construed" by both federal agencies and reviewing courts, *Department of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976); *see Vaughn* v. *Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Under the FOIA, therefore, Government agencies may only decline to disclose information that falls squarely within one of these explicit exemptions. Indeed, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361.[1]

In the instant case, the court of appeals rejected the Government's claim that documents revealing whether an individual is an American citizen can be withheld from public scrutiny pursuant to Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). Exemption 6 permits Government to withhold requested information, the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy," but only if the information is contained in "personnel and medical files and similar files." *Id.* The court of appeals held that the Government had failed to meet the threshold requirement of Exemption 6 that the information sought to be withheld — *i.e.*, an individual's United States citizenship — be "similar" to information contained in "personnel and medical files." *Washington Post Co.* v. *Department of State*, 647 F.2d 197, 199 (D.C. Cir. 1981)(*per curiam*).[2]

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[1] As Chief Justice Burger noted in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 573 (1980), journalists serve as "surrogates for the public" in obtaining information in the hands of Government. For a study of 250 major news articles based on information disclosed under the FOIA, *see* Congressional Research Service, *Press Notices on Disclosures Made Pursuant to the Freedom of Information Act, 1972-1980: A Compilation* (Feb. 27, 1981).

[2] Contrary to the Government's assertion, *see* Brief of Petitioners at 10-11, the court of appeals applied Exemption 6's threshold analysis to the specific information requested about citizenship, *not* to the type of file in which that information may be contained. *See* Washington Post Co. v.

Amici believe that the decision below is both sensible and unsurprising. Government cannot, pursuant to Exemption 6, withhold from disclosure that category of information which is uniquely "public," such as the fact that an individual is or is not an American citizen. Exemption 6 is "directed at threats to *privacy* interests more palpable than mere possibilities." *Rose*, 425 U.S. at 380 n.19 (emphasis added). It has no application whatsoever to information such as citizenship, which defines an individual's quintessentially *public* relationship to his political community.

Citizenship is representative of that class of uniquely public information that simply can never be considered "private" in any meaningful sense. Citizenship is the *sine qua non* of membership in a political system. In a democracy, citizens alone are guaranteed the right to take part in self-government by voting. *See, e.g., Sugarman* v. *Dougall*, 413 U.S. 634, 647-49 (1973). Candidates for election to federal office must come from among the ranks of citizens. *See, e.g.*, U.S. Const., art. I, §§ 2, 5; *id.*, art. II, § 1. Citizenship must be publicly disclosed in a plethora of public fora in connection with, *inter alia*, travel, payment of taxes, and application for public employment. *See, e.g., Sugarman*, 413 U.S. at 647-49; *Examining Board* v. *Flores de Otero*, 426 U.S. 572 (1976); *In re Griffiths*, 413 U.S. 717 (1973).[3]

Department of State, 647 F.2d 197, 199 (D.C. Cir. 1981) (*per curiam*). Indeed, when the District of Columbia Circuit first explicated the contours of Exemption 6's threshold analysis, it asserted clearly that the relevant question is "whether *information* to which access is denied under the aegis of Exemption 6 is 'similar' to personnel or medical files." Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 397 (D.C. Cir. 1980) (emphasis added).

[3] In the category of licenses which are open for public inspection, for example, citizenship is required for broadcast licenses, 47 U.S.C § 310, for licensed American-flag vessels which must have a crew composed of 75% American citizens, 46 U.S.C. § 672(a), for licensing of aeronautical radios, 47 U.S.C. § 310, for federal off-shore mineral rights which cannot be

Indeed, naturalized citizens must declare allegiance to the United States in *open* court, *see* 8 U.S.C. § 1448, a ceremony that so symbolizes the public nature of citizenship that it may not take place in a judge's chambers, *see United States* v. *Ginsberg*, 243 U.S. 472 (1917).

This Court has oft-emphasized that the "act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony." *Foley* v. *Connellie*, 435 U.S. 291, 295 (1978); *accord, Sugarman*, 413 U.S. at 648. "A new citizen," this Court has held, "has become a member of a Nation, a part of a people distinct from others." *Foley*, 435 U.S. at 295; *see Worcester* v. *Georgia*, 6 Pet. 515, 559 (1832). A citizen alone "belongs to the polity and is entitled to participate in the processes of democratic decisionmaking," *Foley*, 435 U.S. at 295, and is the essential ingredient inherent in the "basic conception of a political community," *Sugarman*, 413 U.S. at 647. Thus, there can be no doubt that

> [t]he distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times, indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance.

Ambach v. *Norwick*, 441 U.S. 68, 75 (1979). Regardless of the circumstances of a particular FOIA request, therefore, no legitimate expectation of privacy can attach to the fact of citizenship.

But citizenship is by no means the only species of information about individuals that is uniquely "public." This Court's

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owned by a corporation with an appreciable number of alien owners, 30 U.S.C. §§ 22 & 181, and for ownership of agricultural lands in some states, 1979 Iowa Acts ch. 113, §§ 2-6.

decisions explicating the fundamental protection accorded political information go a long way toward defining that category of information which must be considered uniquely "public." The fact that an individual has been elected to public office, for example, like the fact that he is an American citizen, can never constitute "private" information "in a republic where the people are sovereign." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). [4] The uniquely public nature of the identities of elected officials extends to candidates for elective office as well. *Id.* [5] At the very least, therefore, the identity of a candidate or former candidate is ineligible for classification as private information.

Similarly, the category of uniquely public information encompasses identification of those who have performed governmental functions through appointment to public office, public employment, or government contract. This Court has asserted that "[c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt* v. *Baer*, 383 U.S. 75, 85 (1966). [6] The public interest in disclosure extends beyond the identities of those engaged in public employment *per se* to include "those

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[4] Such information cannot logically be withheld in the name of privacy since "the identities of those who are elected will inevitably shape the course that we follow as a nation." Buckley v. Valeo, 424 U.S. 1, 14 (1976); *see, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841 (1978); New York Times Co. v. Sullivan, 376 U.S. 254, 275-76 (1964).

[5] Indeed, this Court has suggested that all, or nearly all information about candidates is "integral to the operation of the system of government established by our constitution." Buckley v. Valeo, 424 U.S. 1, 14 (1976); *see* Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300-01 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

[6] Such salutary criticism is rendered impossible if the public is denied ready access to the identities of "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsi-

who contract to carry out governmental missions" since they "are as much in the public domain as any so-called officeholder." *Id.* at 89 (Douglas, J., concurring).[7]

That FOIA Exemption 6 does not license Government to withhold from disclosure this category of uniquely public information, regardless of the circumstances, has been recognized repeatedly by reviewing courts. In the instant case, the court of appeals correctly held that the fact of United States citizenship can never be withheld in the name of privacy. *See Washington Post Co.*, 647 F.2d at 199. Similarly, in *Simpson* v. *Vance*, 648 F.2d 10 (D.C. Cir. 1980), the court concluded that, *inter alia*, information concerning an individual's military service and other public employment does not fall within Exemption 6, *see id.* at 11 n.3. In *Sims* v. *CIA*, 642 F.2d 562, 575 (D.C. Cir. 1980), the names and addresses of government contractors and consultants were held outside the scope of Exemption 6. In *Kurzon* v. *Department of Health & Human Services*, 649 F.2d 65, 70 (1st Cir. 1981), the First Circuit ruled that the "public character" of government contracts renders the identities of those who apply for them uniquely public as well.[8]

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bility for or control over the conduct of governmental affairs." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[7] Indeed, the cases recognizing the dominance of the public interest in disclosure of information concerning government contractors and consultants over privacy-related concerns are legion. *See, e.g.*, Arizona Biochemical Co. v. Hearst Corp., 302 F.Supp. 412 (S.D.N.Y. 1969); Adey v. United Action for Animals, Inc., 361 F.Supp. 457 (S.D.N.Y. 1973), *aff'd mem.*, 493 F.2d 1397 (2d Cir.), *cert. denied*, 419 U.S. 842 (1974); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F.Supp. 947 (D.D.C. 1976), *aff'd mem.*, D.C. Cir. Mar. 31, 1978.

[8] Although uniquely public information cannot be withheld under Exemption 6 on the ground that its disclosure would constitute a "clearly unwarranted invasion of privacy," such information may well be legitimately withheld pursuant to another FOIA exemption. For example, an individual's status within the armed forces or association with an intelligence agency may be exempt for national security reasons through Exemption 1 under

The FOIA, like the First Amendment itself, reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). As this Court recognized in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 575 (1980), public access to "public" information is essential to the "common core purpose of assuring freedom of communication on matters relating to the functioning of government."[9] The fundamental interest of a self-governing people "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978).

By the same token, courts have readily distinguished uniquely public matters such as citizenship from other information about individuals that may arguably invade their privacy. *See Rural Housing Alliance* v. *United States Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974); *accord, Simpson*, 648 F.2d at 14. The decision in *Simpson* further suggests additional criteria that a reviewing court ought to consult in

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some circumstances. *See* 5 U.S.C. § 552(b)(1). Indeed, even though the appellate court in *Simpson* ruled that the requested information could not be withheld under Exemption 6, the district court has since upheld the Government's decision to withhold the information pursuant to Exemption 3, 5 U.S.C. § 552(b)(3). *See* Simpson v. Department of State, No. 79-674 (D.D.C. June 9, 1981).

[9] *See, e.g.*, C. Black, *Structure and Relationship in Constitutional Law* 39-45 (1969) (structure of Constitution indicates that free flow of information is necessary to facilitate self-government); A. Meiklejohn, *Free Speech and Its Relation to Self-Government* 27 (1948) (freedom of information is "a deduction from the basic American agreement that public issues shall be decided by universal suffrage"); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 23 (1971) (self-government requires free political expression).

determining whether requested information triggers application of Exemption 6. In most cases, uniquely public information will be made available by government agencies routinely, such as the public employment histories under consideration in *Simpson*. See 648 F.2d at 14. In addition, most affected individuals will have "no expectation" that such uniquely public information will remain confidential. *Id.* The majority of these persons will have "no desire for confidential treatment" of uniquely public information. *Id.* Finally, and perhaps of most importance, uniquely public information is frequently treated as a matter of public record, such as citizenship under 8 U.S.C. § 1448, or public employment under 5 C.F.R. § 294.702 (1980). *See id.* at 15. Thus, "widely disseminated information" contained in public records or made available at public proceedings will rarely, if ever, give rise to a justifiable expectation of privacy. *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 310 (1977); *see Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976).

The decisions in *Washington Post Co.* and *Simpson*, therefore, simply recognize that a reviewing court must "look behind the name given to the records containing the withheld information and determine whether the information is of the type which falls within the scope of Exemption 6." *Simpson*, 648 F.2d at 15. In cases involving uniquely public information such as citizenship, courts need not "reach the issue of balancing interests in disclosure against privacy concerns." *Washington Post Co.*, 647 F.2d at 199. [10] In such cases, courts can and

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[10] In the instant case, the Government is in effect asking this Court to amend Exemption 6 judicially to remove the threshold requirement imposed by the phrase "personnel and medical files and similar files." *See* Brief of Petitioners at 36 ("any item of personal information in the records of a federal agency" is eligible to be withheld under Exemption 6). Simultaneously, the Reagan administration is seeking to achieve the same result in the proper forum — *i.e.*, the Congress. *See* S.1730, 97th Cong., 1st Sess. 37 (1981) (would remove Exemption 6 threshold requirement). Indeed, prop-

should "avoid the difficulties inherent in attempting to balance meaningfully widely disparate interests." *Kurzon*, 649 F.2d at 67. [11]

Of greater significance, however, is the basic conception of representative government implicit in the court of appeals decision. The FOIA and the structure of democracy share an essential unity of purpose — the need to ensure the effectiveness of a self-governing people. In such a political system, some in-

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osed amendments to the FOIA would also address the Government's concern for the physical safety of American citizens and other persons. *See id.* at 37-38.

[11] The Exemption 6 threshold requirement affirmatively limits the discretion of Government to withhold information that, if disclosed, would constitute an invasion of privacy. Officials of a democratic government ought to have, at best, limited discretion to determine that specific information is "private." *See* Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971). Such discretion can be misused by Government officials who are thereby invited to withhold information when it is in their self-interest to do so. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).

Indeed, agencies have become expert at the art of selecting a plausible FOIA exemption that arguably applies to requested information, thereby ensuring that it will not be disclosed until months or even years after the original request. *See Oversight of the Administration of the Federal Freedom of Information Act, Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. 120 (1980) (testimony of Jack Landau, The Reporters Committee for Freedom of the Press). Even when Government officials act in good faith, the concept of privacy necessitates a "balancing" of interests that will often lead to extensive delays in disclosure. *See* Freund, *Privacy: One Concept or Many?* in *Privacy* 182, 192-93 (NOMOS XIII J. Pennock & J. Chapman eds. 1971) (privacy concept fosters "imprecise analysis of legal issues"). Especially when, as in the instant case, the requester of information is a news media organization, disclosure delayed often amounts to disclosure denied since "news quickly goes stale [and] commentary rapidly becomes irrelevant" to public debate. Washington Post Co. v. Keogh, 365 F.2d 965, 972 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). In this case, for example, the information at issue was first requested two years ago when the revolution in Iran was still a critical and developing news event.

formation, such as an individual's citizenship, can never be denied to the people because it has been judged to be somehow "private." As James Madison explained, "[i]f we advert to the nature of Republican government we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794). The draftsmen of the FOIA made clear their intention that interpretation of the statute must share Madison's vision:

> A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a political truism needs repeating.

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2429 (1965).

CONCLUSION

Amici respectfully request that the judgment below be affirmed.

Respectfully submitted,

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Appendix

February 4, 1982

Bruce W. Sanford, Esquire
Baker & Hostetler
818 Connecticut Avenue, N.W.
Washington, D.C. 20006

Re: United States Department of State, et al. v. The Washington Post Company, No. 81-535

Dear Mr. Sanford:

In response to your letter of January 29, 1982, I hereby consent, on behalf of the petitioners, to the filing of a brief *amicus curiae* on behalf of the Society of Professional Journalists, Sigma Delta Chi, in this case.

Sincerely,

/s/ REX E. LEE
Rex E. Lee
Solicitor General

February 2, 1982

Bruce W. Sanford, Esq.
Baker & Hostetler
818 Connecticut Ave., N.W.
Washington, D.C. 20006

Re: *United States Department of State* v. *The Washington Post Co.*, No. 81-535

Dear Mr. Sanford:

Counsel for the Washington Post Company hereby consents to the filing of an amicus curiae brief on behalf of a number of national press organizations.

Very truly yours,

/s/ LON S. BABBY
Lon S. Babby